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Supreme Court, U.S.
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No. 03-____

In The

Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, and ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,

Petitioners,

v.

WISCONSIN BELL, INC., d/b/a Ameritech Wisconsin, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996 ("Act"), Congress enacted a national framework for the development of local telecommunications competition, supplanting decades of state-sanctioned local service monopolies. To open these markets, Congress established new procedures in the Act, 47 U.S.C. § 252, for the negotiation and arbitration of interconnection agreements and the development of statements of generally available terms and conditions ("SGATs"), pursuant to which competing providers could gain entry through interconnection, resale, or access to the incumbents' unbundled network elements. In order to administer this new scheme for the development of competitive local markets, Congress sought to encourage the cooperation of state regulatory commissions by giving them opportunities to (1) participate directly in the administration of § 252, and (2) implement their own pro-competition measures provided they are consistent with the Act.

The question presented is whether a state commission order is consistent with the Act's provisions allowing additional pro-competitive state measures when the order requires, without setting rates, terms, or conditions, the tariffed offering of certain combinations of an incumbent provider's unbundled network elements.

PARTIES TO THE PROCEEDING

The petitioners are Ave M. Bie, Burneatta Bridge, and Robert M. Garvin, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. One original Commissioner defendant, Joseph P. Mettner, left office and was replaced by Burneatta Bridge on January 6, 2003.

Respondents in the case are Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (n/k/a SBC Wisconsin), the plaintiff-appellee, and WorldCom, Inc., an intervening defendant-appellant.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003). The decision of the United States District Court for the Western District of Wisconsin is *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Bie, et al.*, Case No. 01-C-0690-C (W. D. Wis. September 26, 2002)(Opinion and Order) and is unreported. The decision of the Public Service Commission of Wisconsin ("Commission") is in two parts in *Investigation Into Ameritech Wisconsin Operational Support Systems*, Docket No. 6720-TI-160 (Pub. Serv. Comm'n Wis. Sept. 25, 2001)(Final Decision (Phase I)) and (Pub. Serv. Comm'n Wis. Nov. 14, 2001)(Order Denying Rehearing and Corrections to Final Decision (Phase I)) (collectively, "*OSS Final Decision*"). Only the Final Decision (Phase I) is reported in electronic format, at 2001 WL 1671061.

All of the foregoing decisions are set forth in the Appendix of the Petition for a Writ of Certiorari filed by WorldCom, Inc., in *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003), *petition for cert. filed,* (U.S. Oct. 17, 2003)(No. 03-603).[1]

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion in this matter and entered judgment

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[1] Hereinafter all references to pages of the Appendix of WorldCom's Petition for a Writ of Certiorari (U.S. 03-603) will be denoted by "Ap-W.," followed by the relevant page number. References to the pages of the appendix of this petition will be denoted by a preceding "Ap."

on August 12, 2003. The Commissioners are filing this Petition for a Writ of Certiorari within 90 days of the entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the certain sections of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The principal sections at issue are codified at 47 U.S.C. §§ 251, 252, and 261. Also at issue is § 601(c)(1) of the Act, which is published as an uncodified note to 47 U.S.C. § 152. State statutes, especially Wis. Stat. §§ 196.03(6), 196.19(1), 196.196(2)(a) and 196.219(2m), also concern this case. Relevant constitutional and statutory provisions are in the Appendix to this Petition.

STATEMENT OF THE CASE

At issue here is whether a state commission order requiring the tariffing of certain wholesale interconnection access services for use by competing providers is consistent with the Telecommunications Act of 1996.[2] In a 2-1 decision the Seventh Circuit determined that the existence of negotiation and arbitration procedures in § 252 of the Act provided an exclusive process for competitors to interconnect with an incumbent's network and consequently preempted the Commission's action. This holding, however,

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[2] Pub. L. 104-104, 110 Stat. 56 (1996)(hereinafter referred to as "1996 Act" or "Act"). The Act is codified throughout Title 47 of the United States Code. References to the Act are to relevant sections of Title 47 and are denoted by the symbol "§," except as otherwise noted.

is the result of a flawed preemption analysis, as well-critiqued in the dissent, and directly conflicts with rulings of two other circuits and the Federal Communications Commission ("FCC") that validate tariffing as a means of state action consistent with the Act. Most critically, the ruling substantially undercuts Congress' scheme that expressly authorizes state action to promote local telecommunications competition by means consistent with the 1996 Act. Without tariffing, a state commission cannot effectively promote competition, and without state action, Congress' preservation of parallel, pro-competitive state action is thwarted.

This case arises from the Final Decision (Phase I) order of the Public Service Commission of Wisconsin that requires Wisconsin Bell, Inc., d/b/a SBC Wisconsin ("Wisconsin Bell"), to tariff its offering of two combinations of unbundled network elements ("UNE"): unbundled network element-platforms ("UNE-P")[3] and extended enhanced link (or lines) ("EEL").[4] Both offerings constitute UNE combinations providing access to the network of the incumbent telecommunications carrier per § 251(c)(3). The Commission began this investigative proceeding to assure Wisconsin Bell's wholesale products and operational support systems ("OSS") used by competitors to access its network provided competitors a meaningful opportunity to compete. In the Final Decision (Phase I), the Commission ordered tariffing of UNE-P and EEL combinations pursuant to state

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[3] A UNE-P is a simple combination of all of the elements, principally the local loop and switching, that may be combined to form local voice-grade service. Ap-W. 54a.

[4] An EEL is typically a high-capacity circuit or channel comprised of unbundled loops and transport between two points, typically between a customer and a long distance provider, or between a customer and an Internet Service Provider. Ap-W. 46a.

law. Ap-W. 37a-75a. Wisconsin Bell sought rehearing, but the Commission denied the petition. Ap-W. 76a-87a.

On December 13, 2001, Wisconsin Bell filed a complaint in federal district court for declaratory and other relief from the provisions of the Final Decision (Phase I).[5] Wisconsin Bell alleged *inter alia*, that the Commission was preempted by the interconnection procedures of the Act from ordering the tariffing of existing and new UNE-P and EEL combinations. Wisconsin Bell asserted federal question jurisdiction under 47 U.S.C. § 252 and 28 U.S.C. §§ 1331, 1337, 2201, and 2202, and named the individual commissioners as defendants to enjoin them from enforcing their decision.

The district court subsequently ruled on September 26, 2002, granting declaratory relief. The district court ruled that the Commission's requirement for tariffing of the combinations of unbundled network elements was preempted because an "exclusive method" for such offerings is specified in the negotiation and arbitration procedures in 47 U.S.C. § 252. Ap.-W. 30a-32a. Consequently, an entrant's right to resort to a tariff offering of the same UNE combination "evad[es] the interconnection agreement process in § 252," and "completely displaces the incumbent's ability to negotiate through congressionally prescribed interconnection agreements . . . ." Ap-W. 31a-32a.

The district court entered judgment on September 30, 2002. Ap-W. 35a-36a. WorldCom, Inc., an intervenor in the

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[5] The complaint also included review of the Commission's Order Denying Rehearing and Corrections to Final Decision (Phase I), dated November 14, 2001, but that order is not relevant here.

lower court, filed an appeal on October 28, 2002, with respect to the district court's preemption decision on the second claim. The Commissioners filed a parallel notice of appeal on October 29, 2002. Both appeals alleged appellate jurisdiction under 28 U.S.C. § 1291.

The court of appeals issued its decision (Ap-W. 1a-18a) and entered judgment (Ap-W. 19a) affirming the district court on August 12, 2003, with Judges Richard Posner and Frank Easterbrook writing the majority opinion, and Judge Richard Cudahy the dissent. This Petition for a Writ of Certiorari follows.

The Commission Decision

The Commission ordered Wisconsin Bell to tariff its UNE-P and EEL service offerings "as a general proposition," based on finding that "competition will be enhanced, consumer choices increased, and existing telecommunications facilities will be efficiently utilized." Ap-W. 46a, 56a. These findings tracked with factors in Wis. Stat. § 196.03(6) that the Commission is statutorily directed to apply in assessing the overall public interest, especially the promotion of telecommunications competition. Ap-W. 46a, 49a. The Commission concluded, under Wis. Stat. §§ 196.02, 196.04, 196.219(3)(a) and (f), 196.219(4)(a), 196.37(2), and 196.199(2),[6] that it had state law authority to

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[6] Wis. Stat. § 196.02, in particular sub. (1), provides the Commission with general supervisory jurisdiction over public (including telecommunications) utilities. Wis. Stat. § 196.04 is the Commission's long standing jurisdiction to order the physical connection of, and set terms and conditions for, interconnection of telecommunications networks. Wis. Stat. §§ 196.219(3)(a) and (f) compel telecommunications providers to provide additional interconnection and UNE access upon Commission order, while Wis. Stat. § 196.219(4) and 196.37(2) provide the jurisdiction to administratively enforce the

require the tariffing of the two services to promote competition. Ap-W. 55a. Taken together, the foregoing state statutes authorize the Commission through administrative directives, such as a "just and reasonable" order compelling the tariffing of a service, to promote competition in telecommunications services. Ap-W. 55a.

Cognizant of the issue of possible federal preemption, the Commission also concluded that its order was "protected as additional, consistent, pro-competitive state action by §§ 251(d)(3), 252(e)(3), and 261(c)."[7] In general, these federal statutes permit states to require additional access and to take competitive actions, beyond the federal minimums, provided the actions are consistent with the Act. Ap-W. 56a-57a.

As the required UNE-P and EEL offerings qualified as unbundled access under Wis. Stat. § 196.01(1b),[8] the

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foregoing duty with "just and reasonable" orders. Wis. Stat. § 196.199(2) specifically authorizes the Commission to do every thing necessary and convenient with respect to the approval and enforcement of § 252 interconnection agreements. See Ap. 22a-27a and 29a-31a for specific texts.

[7] Section 251(d)(3) precludes FCC action that would bar state action that (1) establishes access and interconnection obligations of local exchange carriers, (2) is consistent with § 251, and (3) "does not substantially prevent implementation of requirements of this section and purposes of this part." Ap. 6a. Section 252(e)(3) permits a state commission to establish or enforce requirements of state law in the course of reviewing a § 252 agreement, and § 261(c) permits a state to impose requirements that are necessary to further local telecommunications competition, "so long as the State's requirements are not inconsistent with this part [II] or the [Federal Communications Commission's ("FCC")] regulations to implement this part." Ap. 16a-17a, 20a.

[7] See Ap. 21a.

Commission ordered Wisconsin Bell to tariff them in compliance with the mandatory access tariffing provisions of Wis. Stat. §§ 196.196(2)(a) and 196.219(2m),[9] but did not specify rates, terms, and conditions. Ap-W. 57a, 59a. The Commission rejected Wisconsin Bell's argument, based on *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809-10 (W.D. Mich. 2000)("*Verizon North*")[10] and *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1177-79 (D. Or. 1999), that the Commission was preempted from ordering tariffing of the services. Responding to those cases, the Commission found that the tariffed offerings could not "create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." Ap-W. 57a. Furthermore, concluded the Commission, the terms of § 252(f)(1) envision tariffing to satisfy the requirements of a statement of generally available terms ("SGAT")[11] and the protection of state action in

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[9] See Ap. 26a, 28a. Under its election of price-regulation pursuant to Wis. Stat. § 196.196(1), Wisconsin Bell's access rates are not subject to traditional substantive Commission rate-making jurisdiction, but the tariff publication requirements in Wis. Stat. §§ 196.196(2)(a) and 196.219(2m) still apply.

[10] *Affirmed in relevant part, vacated in part, Verizon North, Inc., v. Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, __U.S.__, 123 S. Ct. 1649 (2003).

[11] An SGAT is a summary of the terms and conditions under which a Bell Operating Company, such as Wisconsin Bell, § 153(4), "offers" interconnection, resale, and access to unbundled network elements, and satisfies other requirements of § 251 of the Act. Significantly, sub. (2) of the section, defining state commission review, expressly permits a reviewing state commission to enforce "other requirements" of state law in the conduct of the review. Wis. Stat. § 196.19, 196.196(2)(a) and 196.219(2m), require that all telecommunications utility's services, including wholesale access be tariffed. The Commission had ordered Wisconsin Bell under these statutes to tariff wholesale access services when Wisconsin Bell previously submitted an SGAT (ultimately rejected) for Commission review in *Matters Relating to Satisfaction of*

§§ 251(d)(3), 252(e)(3) and 261(c), "strongly imply that Congress was not generally preempting state power to order tariffing of services otherwise consistent with the Act." Ap-W. 57a.

The District Court Decision

The district court held that the Commission's order for tariffing was inconsistent with the Act's procedures in § 252 and, therefore, the Commission was preempted from ordering the tariffing of UNE-P and EEL service offerings. Ap-W. 33a-34a. The tariff requirement allowed an entrant to unilaterally choose a tariff over an interconnection agreement, thereby displacing the "incumbent's ability" to negotiate UNE-P and EEL offerings through the interconnection agreement process. Ap-W. 31a, 33a. The district court rejected defendants' arguments citing the validation of tariffs implicit in *U.S. West Commun's., Inc. v. Sprint Commun's. Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002)(holding that a § 252 agreement may reserve the right of a party to resort to a tariff for services) and the Federal Communications Commission's *Texas Preemption Order.*[12] Ap-W. 33a. Requiring the incumbent to file public tariffs "evades the exclusive process required by the 1996 Act," held the district court, citing *Verizon North.* Ap-W. 31a-32a.

Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin), Docket No. 6720-TI-120, slip op. at 92 (Pub. Serv. Comm'n Wis. Dec. 12, 1996).

[12] *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 3522-26, ¶¶ 138-39, 1997 WL 603179 (1997) (Memorandum Opinion & Order) (affirming as optional and not preempted a Texas statutory requirement that an incumbent's wholesale resale tariff must offer a minimum five percent discount from comparable retail rates).

The Court of Appeals Decision

Majority: The court of appeals majority framed the question before it as "whether a state may create an alternative method by which a competitor can obtain interconnections rights." Ap-W. 2a. Recognizing that the Act provides that a state's regulations concerning local competition "are not preempted, 'if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act],'" Ap-W. 2a-3a, the majority nonetheless determined that the state's tariffing requirement must be preempted because it "*has* to interfere with the procedures established by the federal act." Ap-W. 6a.

The majority's analysis starts with a discussion of tariff services and the bare premise that a "carrier or utility is constrained to fix a rate no higher than necessary to cover the cost of the service." Ap-W. 4a-5a. From this the court reasoned that Wisconsin Bell's "pricing freedom" is constrained by the likely upper end of the "range of prices" resulting from a negotiation, as a competitor would likely expect to do better in negotations. Ap-W. 5a. The majority determined, based on two Commission orders in *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161,[13] issued six months after the *OSS Final Decision* appealed here, that the Commission requires tariffed rates based on its prescribed cost-accounting procedures and thus "is making the tariff in a realistic sense." Ap-W. 5a.

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[13] Final Decision, *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 22-23, (Pub. Serv. Comm'n Wis. Mar. 22, 2002) and UNE Compliance Order, *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 61 (Pub. Serv. Comm'n Wis. July 9, 2003). Hereinafter collectively referred to as the "*UNE Final Decisions*."

The majority determined that the tariffing requirement "places a thumb on the negotiating scales" against the local incumbent by forcing it to state its "reservation price,"[14] the disclosure of which allows a competitor to choose to seek a lower price "by challenging the tariff before the state regulatory commission, with further appeal possible to a state court." Ap-W. 6a. Furthermore, a tariff "shortcircuits negotiations, making hash of the statutory requirement" that delays arbitrations for 135 days of negotiation. Ap-W. 7a. Lastly, the "pro-competition" interpretations of the Commissioners and WorldCom upset the Act's "compromise between interest groups." The majority concluded that the § 252 negotiation procedure in the Act "provides the local phone company with a degree of protection it would lack" if a state-ordered tariff enabled "would-be entrants to bypass the federally ordained procedure." Ap-W. 7a.

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[14] While the majority did not define "reservation price," the term has been defined elsewhere as that price, for a seller, that is "the minimum amount that the seller would rationally accept." *Matter of Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 531 F. Supp. 1191, 1218 (Sp. Ct. R.R.R.A. 1981). Reservation prices are usually secret or unknown in negotiations; "few bargainers reveal their reservation prices." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 704 F.2d 1325, 1344 (7th Cir. 1986).

Dissent:

Judge Richard Cudahy opined in dissent that the "only question . . . is whether a Wisconsin order requiring an incumbent carrier to offer by tariff the same network elements available by negotiated and arbitrated interconnection agreements is 'inconsistent' with the 'provisions' of the Act." Ap-W. 10a. Specifically, Judge Cudahy rejected as unsupported by the Act, the majority's core conclusion that the Act has authorized "only one method to achieve interconnection and establish its terms." Ap-W. 18a.

According to Judge Cudahy, the Act's terms limited its preemptive power and, in fact preserved "an important and integral role" to state commissions. Ap-W. 8a-9a. Judge Cudahy disagreed with the majority's conflict preemption ruling for several reasons. First, the majority followed the Sixth Circuit's error in misinterpreting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) because, unlike the statutes at issue in *Gade* that intended to occupy the entire field, the Act is the exact opposite, "specifically embrace[ing] . . . parallel regulation." Ap-W. 11a. Second, the FCC-mandated ubiquitous application of TELRIC[15] cost methodology to set UNE prices rendered unrealistic the majority's concern that the state's tariffing requirement is somehow a "thumb on the negotiating scale." Because of the federal TELRIC, the state commission's retain a "central" role, but one that is subject to federal court review under 28 U.S.C. § 1331. Wisconsin Bell's

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[15] "TELRIC" denotes "Total Element Long Run Incremental Cost," a methodology specified for pricing unbundled network elements necessary for interconnection under the Act. *See* 47 C.F.R. §§ 51.1, 51.501-505. The rules were ultimately upheld in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

reservation price in practice is "quasi-public in all interconnection environments," so a tariff "does not impede the right of an entrant to demand negotiation." Ap-W. 14a-15a. Lastly, the majority "goes seriously astray" (Ap-W. 16a) in speculating about possible terms based upon Commission *UNE Final Decisions* not at issue here. The OSS access tariffs clearly may be filed and revised by Wisconsin Bell without Commission approval. Ap-W. 16a-17a. Thus, for the dissent, the differences between tariffing and § 252's procedures are "matters of form, not involving substance, and are not inconsistent with the provisions of the Act." Ap-W. 17a.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari because court decisions of different circuits are diametrically opposed as to whether required tariffing is a pro-competitive state commission administrative action consistent with the Telecommunications Act of 1996. The Seventh Circuit's erroneous ruling effectively preempts any state administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. Contrary to the letter and the intent of the Act, the Seventh Circuit's ruling effectively declares that "consistent with the Act" really means "identical to the Act."

This holding completely nullifies any practical ability of a state commission to use the authority under the Act to advance any state pro-competition measure that is consistent with Act, but may go beyond the Act's minimums. Moreover, the Seventh Circuit's ruling slows the development of the very competition sought by the Act by effectively allowing every incumbent to force all

interconnection through the time frames in § 252 procedures—even where a new competitor would be willing to take a tariff price to speed market entry.

Most importantly, the erroneous ruling makes a "hash" of the cooperative federalism designed for the Act's administration. By declaring the exclusivity of § 252 procedures and their preemptive effect upon the historical state commission tariffing power, the Seventh Circuit decision denies any meaningful opportunity for state commissions to promote state competition objectives in concert with the Act. Without tariffing, their explicit right under the Act, to promote their own state-law objectives, if "consistent" with the Act, is thus rendered unusable and essentially meaningless. As construed by the Seventh Circuit, the Act preempts state authority in spite of explicit policy incentives Congress enacted to encourage state participation in the Act. Using the Seventh Circuit ruling, incumbents will likely cause a flood of litigation seeking preemption of any state-law pro-competition measure. The tariffing issue has already lead to judicial review of agency tariff decisions in Michigan[16] and Oregon,[17] as well as the Wisconsin decision at issue here. The Act's cooperative federalism scheme—and indeed, its competitive market objective—is put at substantial and needless risk because

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[16] *E.g.*, *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 1649 (2003) (preempting tariffed services as improperly permitting "complete bypass" of § 252 procedures) and *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003) (validating pre-Act tariffs for wholesale services).

[17] *MCI Telecommuns. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999)(holding structure of tariffs improperly permitted "off the rack" ordering of services that dispensed with interconnection agreement altogether).

state commissions will not be able to use state authority to advance local telecommunications competition.

This Court should undertake review in order to confirm that under the Act tariffing is not preempted, but permitted, and enables Congress' objective of enlisting the states to develop local telecommunications competition under the new "national policy framework" of the Act. H.R. Conf. Rep. No. 104-458, at 1, 113 (1996).

I. THE SEVENTH CIRCUIT'S HOLDING THAT A STATE REQUIREMENT FOR TARIFFING OF CERTAIN WHOLESALE UNE SERVICES IS PREEMPTED BY THE PROCEDURES IN § 252 OF THE 1996 ACT CONFLICTS WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS AND THE FCC.

The Seventh Circuit's opinion that tariffing is in effect facially preempted by § 252 procedures contradicts the decisions of the Sixth and Tenth Circuits that sustain tariffing as a tool for state action. The split among the circuits constitutes a substantial basis for grant of the petition for certiorari. Sup. Ct. R. 10(a). Under the ruling at issue, Wisconsin is effectively denied "equal access" to the Act's provisions that preserve substantive state pro-competitive measures that are consistent with the Act. A national act that issues the identical invitation to the states to participate in the Act should not be construed to give significantly different rights among the states. It is wholly unacceptable to let the split caused by the ruling deny tariffing authority to Wisconsin, but not to other states, such as Michigan. By granting review the Supreme Court can correct a serious interference with the uniformity of Congress' intended

design for state participation in the administration of the 1996 Act.

Moreover, the Seventh Circuit's ruling differs strongly from holdings of the FCC, the federal agency charged with administering the Act. This major variance is also a basis for grant of certiorari. *See, e.g., FPC v. Texaco, Inc.*, 417 U.S. 380, 383 (1974) (District of Columbia Court of Appeals decision reviewed because it set aside an agency order purporting to deregulate certain gas producers and assert new authority) and *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 343 (1979) ("We granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy.")

Two courts of appeal have ruled correctly to validate tariffing ordered under state law. First, in *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 358-60 (6th Cir. 2003)("*Michigan Bell*"), the Sixth Circuit held that Michigan's 1991 requirement for wholesale tariffs for rates, terms, and conditions for basic local exchange service were not impliedly preempted by the 1996 Act, "so long as the regulations do not interfere with the ability of new entrants to obtain services." While *Michigan Bell* concerned a pre-Act tariff requirement preserved by § 261(b), the instant case deals with a new post-1996 tariffing requirement ordered by the Commission as an additional pro-competition state action protected by § 261(c). The Sixth and Seventh Circuit decisions are diametrically opposed, however, on the propriety of a tariff requirement that is consistent with the Act and intended as additional state action to promote local telecommunications competition. Where the Seventh Circuit majority determined tariffs are preempted because they interfere with § 252

procedures, the Sixth Circuit had no problem upholding the tariff requirement: "The Act . . . recognizes that interconnection agreements are not the sole way to promote competition among local service providers, for it allows room for state regulation." *Michigan Bell*, 323 F.3d at 359. Assuming no prohibition in the interconnection agreement, "the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition. . . . Under the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 359-60.

In the second decision, the Tenth Circuit impliedly upheld the validity of tariffed wholesale interconnection services. In *U.S. West Commun's., Inc. v. Sprint Commun's. Co., L.P.*, 275 F.3d 1241, 1251 (10th Cir. 2002), the Tenth Circuit determined that the express terms of an interconnection agreement could reserve to a new entrant the right to buy interconnection services from the incumbent's tariff, thereby permitting the new entrant to buy on terms set either by the interconnection agreement or the tariff. This position necessarily implies that tariff offerings are valid and compatible with the Act. Otherwise, it would have been illogical for the Tenth Circuit to hold that agreements may incorporate tariffs that are "preempted"—and thus void—by the existence of the Act's own procedures.

The FCC, as the federal agency charged with administering the Act, has held that "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets," and has held lawful a provision of state law that permitted new entrants to purchase local service for resale from the incumbent's tariff at a mandated five percent discount.

Texas Pre-emption Order, 13 F.C.C.R. at 3486, 3522-3526, ¶¶ 52, 139-141. Because the Texas commission continued to award larger resale discounts in § 252 arbitrations, the FCC determined that the discount resale tariff was treated as an "option," and did not, in practice, supersede or negate any provision of the Act, including access to §§ 251 and 252. *Id.*, 13 F.C.C.R. at 3526, ¶ 139.

The FCC's position in the *Virginia Preemption Order*[18] does not invalidate consistent state tariff requirements. In the *Virginia Preemption Order*, the FCC only determined that the incumbent's tariffs, which were incorporated by reference in a § 252 agreement, could not become effective without the entrant's consent or a state commission order if the tariffed rates "materially and adversely" affected the terms of the agreement. *Id.*, 17 F.C.C.R. at 27,326, 27,330, ¶¶ 590, 600. Nowhere in the order, however, did the FCC reject the contemplated tariffs as preempted or precluded by § 252 procedures. The FCC's discussion presumed the validity of tariffs; otherwise the FCC would have dismissed the parties' disagreement respecting the resort to tariffs as mooted by the requirements of § 252.

The FCC, rather than the courts, should set the guidelines for participation in the administration of the new regime, according to this Court. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6 (1999) ("*AT&T*"). Because the FCC is the agency to which Congress has delegated

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[18] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 F.C.C.R. 27,039, 27,329-31, ¶¶ 599-602, 2002 WL 1576912 (2002) (Memorandum Opinion & Order).

implementation of the Act, the FCC is "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (citation and internal quotation omitted). That the FCC has not preempted state-required tariffing should be accorded substantial weight in view of its role in administering the Act. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (substantial deference due statutory interpretation by agency charged with administering the statute).

In light of the foregoing, the Seventh Circuit's decision preempting state tariffing clearly differs diametrically from the position of two other circuits and the FCC. This Court needs to review the issue to assure the proper uniformity of the Act's interpretation.

II. THE SEVENTH CIRCUIT'S PREEMPTION HOLDING IS INCORRECT BECAUSE IT IS BASED UPON AN INCOMPLETE AND FLAWED ANALYSIS.

The Seventh Circuit majority wrongly concluded that any tariffing required by a state commission is preempted by the purportedly exclusive procedures of § 252. Had the majority fully examined the Act's text and structure according to Supreme Court preemption methodology, it could not have reached its preemption conclusion.

In determining preemption, a court's "sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 280 (1987). The

Supreme Court has recognized three forms of preemption: (1) by Congress "so stating in express terms," if within constitutional limits; (2) by implication "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation; and (3) when federal law conflicts with state law and compliance with both is a "physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 280-81 (citations omitted).

The Supreme Court has stated that the interpretation of the statutes at issue "does not occur in a contextual vacuum," but is "informed by two presumptions about the nature of preemption." *Medtronic*, 518 U.S. at 485. The first presumption is that in fields traditionally occupied by the states, the Court proceeds with the assumption that historic police powers of the state are not superseded by federal action "unless that was the clear and manifest purpose of Congress." *Id., citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The second presumption is that the "touchstone" of the analysis of the scope of preemption is Congress' purpose, "primarily . . . discerned from the language of the preemption statute and the 'statutory framework' surrounding it." *Id.* "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (plurality opinion)(citations omitted).

Neither the majority nor the dissent mentioned that the Act nowhere expressly preempts state tariffing, and in

unstated agreement, moved on to the other categories of preemption. But in delving into the Act, the majority's analysis went wrong from the start.

First, the majority made no mention of the historical presumption against preemption of matters where states have historically legislated. This failure leads to the majority framing the question too broadly, whether a state commission may provide an "alternative method" for interconnection. Ap-W. 2a. The dissent, in contrast, properly commenced its analysis with the presumption. Ap-W. 8a. By applying the historical presumption against preemption, and considering § 261(b), which specifically preserves state regulations prior to the Act if they are consistent with the Act, and § 601(c)(1), which bars implied preemption of state law, unless expressly provided, the dissent properly reasoned that the question is simpler, whether the Commission's tariffing requirement is consistent with the Act. Ap-W. 8a-10a. Had the majority considered the same sections, it should have agreed with the dissent that § 601(c)(1) "precludes a broad reading of preemptive authority," *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999), and that §§ 261(b) and 601(c)(1) indicate that Congress "explicitly disclaimed an intent categorically to pre-empt state law[.]" *Guerra*, 479 U.S. at 281 (express disavowal of preemption in Pregnancy Discrimination Act of 1978 precluded finding that Congress preempted state employment discrimination law either expressly or by implication from comprehensive statutory scheme).

Second, the majority initially treats the preemption issue involved as one of conflict preemption (Ap-W. 3a, 6a), but concludes by establishing an implied preemption in the exclusivity of § 252 procedures. The majority asserted conflict preemption when it stated that the tariff requirement

"*has* to interfere with the procedures established by the federal act," Ap-W. 6a, but fails to cite any demonstrable interference with the operation of the Act. But, by taking away the states' necessary power to order tariffing of services, the majority creates an implied preemption of any state commission right to advance competition. The ruling makes surplusage of the terms of §§ 251(d)(3), 252(e)(3) and 261(c) that preserve state jurisdiction. The majority nowhere confronts how its denial of the states' tariffing means ends up substantively removing the states from developing competitive local exchange telecommunications markets, an outcome contrary to §§ 261(b) and (c) and 601(c)(1).

Third, the text and structure of the Act also refute the majority's preemption analysis. As noted above, nowhere has Congress in the Act expressly preempted state tariffing requirements or made § 252 negotiation and arbitration procedures exclusive. It could have easily used the term "preemption," as it did in §§ 252(e)(5) (FCC may preempt a state failing to act under § 252), 253(d) (authorizing FCC to preempt state requirements inconsistent with the § 253(a) and (b)), and 276(c)(preemption of state payphone services inconsistent with the Act). Rather, Congress employed broad, general terms that clearly encompass tariffing as a protected state action device. For example, § 251(d)(3) authorizes states to impose additional access "obligations," and § 261(c) generally permits additional state "requirements" that are consistent with part II of the Act and FCC regulations.

Fourth, the Act's provision for an SGAT in § 252(f)(1) to summarize available access services, clearly contemplates the co-existence of tariffs and interconnection agreements. Tariffing *per se*, therefore, cannot be considered directly in conflict with the Act, and thus preempted. This argument is

never addressed by the majority. Section 252(f)(2) specifically reserves state jurisdiction in an SGAT review to enforce other provisions of state law. Wisconsin law requires Wisconsin Bell to offer services via tariff.[19] Thus, Wisconsin Bell's manner of "offering" wholesale interconnection access services under § 252(f)(1) necessarily requires it to comply with state tariffing requirements for the offering of any wholesale telecommunications utility services, such as UNE-P and EEL access services. Moreover, § 252(f)(5) provides that while an SGAT is pending, and after approval, a Bell Operating Company, such as Wisconsin Bell, must still negotiate § 252 interconnection agreements. Thus, the framework of § 252(f) clearly contemplates that Wisconsin Bell could simultaneously serve some competitors with tariffed services and others under approved interconnection agreements. Section 252 agreements cannot have exclusive effect without rendering § 252(f)(5) mere surplusage.

Fifth, Judge Cudahy correctly noted that the majority's analysis followed the error of the Sixth Circuit decision in *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) by citing out of context the principle in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) (state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goals). The Federal Occupational Safety and Health Act ("OSHA"), the statute at issue in *Gade*, was clearly intended to establish federal occupation of the entire field. Ap-W. 11a. The Act, however, as noted by the dissent, plainly gives the states a "key role in the regulatory scheme" for local telecommunications. Ap-W. 11a.

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[19] Wis. Stat. §§ 196.19(1), 196.196(2)(a) and 196.219(2m).

Congress intended the state commissions to help advance local telecommunications competition. The majority miscast the question at issue because it did not follow the Court's preemption methodology, an inductive approach based upon contextual analysis of an act's structure, language, and text.

III. THE PREEMPTION OF STATE TARIFFING UNDERCUTS CONGRESS' PRESERVATION OF SUBSTANTIVE STATE JURISDICTION AUTHORIZING IMPLEMENTATION OF STATE COMPETITION POLICIES CONSISTENT WITH THE ACT.

Congress' objective of federal and state cooperation to develop competitive local telecommunications markets is wholly frustrated because the Seventh Circuit's preemption ruling essentially holds that § 252 procedures exclude tariffing as a state tool to promote the availability of certain wholesale services useful to competition in the local telecommunications market.

This is not a typical federal preemption case precisely because of the context of Congress' invitation to the states to participate in the Act's cooperative federalism[20] for developing local telecommunications competition. Congress clearly wanted the states to help administer the Act, so in the Act's "complex regulatory scheme," Congress created an

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[20] "The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations, [citation omitted], and checked by federal court review for consistency with these federal provisions." *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

"invitation . . . to the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market," to "voluntarily regulat[e] on behalf of Congress" as "'deputized' federal regulator[s]." *MCI Telecommuns. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2002).

Sections 251 and 252 of the Act provide a scheme that specifies numerous functions that state commissions may perform—if they so choose. *See* § 252(e)(5). But Congress also provided two types of provisions to encourage actual state cooperation. First, to obviate state commission concerns about available administrative resources, Congress sanctioned enforcement of state law requirements in conjunction with the § 252 procedures. *See, e.g.*, §§ 252(e)(3), 252(f)(2) and 252(g). In §§ 252(e)(3)[21] and 252(f)(2),[22] Congress explicitly permitted a state commission to enforce state law requirements in the course of reviewing a § 252 agreement or SGAT. In § 252(g),[23] Congress authorized consolidated proceedings under §§ 214(e), 251(f), 252, and 253 "in order to reduce administrative burdens on . . . . the State commission in carrying out its responsibilities under [the] Act."

Second—and more critically—Congress explicitly provided the opportunity for state commissions to engage in substantive policy making under state law to promote competition, so long as such actions are consistent with the Act's applicable limits. Sections 251(d)(3), 252(e)(3) and 261(c) exemplify Congress' preservation of state policy jurisdiction. Section 251(d)(3) precludes the FCC from

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[21] Ap. 16a-17a.
[22] Ap. 18a.
[23] Ap. 19a.

barring imposition of additional state access regulations that are substantially consistent with the Act. Section 252(e)(3), besides offering an administrative efficiency, also protects a commission's ability to enforce state law requirements. This provision specifically enables the Commission to pursue state competition objectives[24] if the opportunity arises in a § 252 review of an agreement. Finally, subsections (b) and (c) of § 261 preserve pre- and post-Act state measures that advance competition in local exchange telecommunications, provided, generally, that the actions are not inconsistent with the Act or relevant FCC regulations.

Two years before Congress passed the 1996 Act, the Wisconsin Legislature enacted a pro-competitive deregulatory policy for telecommunications in 1993 Wis. Act 496 ("Act 496"), also known as the Information Superhighway Law. The comprehensive revision of state telecommunications law, enacted in a special legislative session, transformed state regulatory policy from traditional rate-of-return regulation to one favoring competition as the principal means of delivering telecommunications services to state consumers. *See* Wis. Stat. § 196.03(6) and 133.01.[25] The Legislature directed the Commission to oversee the effort to develop and promote competition in local exchange and other telecommunications markets, subject to appropriate consumer protection and other safeguards. The Legislature set up specific safeguards and procedures to check the power of incumbent monopoly providers,

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[24] Wis. Stat. §§ 196.03(6) and 133.01. Ap. 22a-23a, 21a.

[25] Wis. Stat. § 196.03(6)(a), enacted in 1993 Wis. Act 496 and effective September 1, 1994, incorporates Wis. Stat. § 133.01, Ap. 21a-22a, which makes competition the "fundamental economic policy of the state," requiring regulatory agencies to pursue the maximum level of competition, "consistent with other public interest goals established by the legislature."

specifically including in Wis. Stat. § 196.219(3)(f) the power to require additional unbundling of an incumbent's network elements. Such additional unbundling qualifies as "access" under Wis. Stat. § 196.01(1b) and must be tariffed by providers, such as Wisconsin Bell, under the requirements of Wis. Stat. §§ 196.196(2)(a) and 196.219(2m).

In the *OSS Final Decision* at issue here, the Commission specifically used state law[26] in reliance upon Congress' explicit protection of state jurisdiction in §§ 251(d)(3), 252(e)(3), and 261(c) to proactively order tariffing of UNE-P and EEL offerings as an additional pro-competitive measure. Ap-W. 46a, 49a, 55a-57a. The Commission especially relied upon §§ 251(d)(3) and 261(c) because they permit proactive state action, such as the tariffing the Commission ordered here.[27] Act 496 represents the very kind of pre-Act regulation that Congress protected in § 261(b), and the order for tariffing is exactly the kind of additional pro-competition measure for local exchange competition protected by § 261(c).

The Commission's tariff requirement benefits a competitor without harming the incumbent. An incumbent like Wisconsin Bell is not harmed, because, as recognized by the dissent, Ap-W. 15a, 17a n.7, Wisconsin Bell's pricing is already "quasi-public" and the company retains the ability to alter TELRIC rates if its costs change. The incumbent, however, cannot be allowed to use the time frames in § 252 procedures to delay a contract between an incumbent and a

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[26] *See*, *supra*, p. 5, listing state laws relied upon.

[27] In contrast, § 252(e)(3) depends upon carriers initiating a § 252 review and whether the parties raise a disputed issue during the course of the review that might provide a vehicle for declaring a state commission competition goal. Sec. 252(b)(4)(A).

competitor where price is not the issue. The Commission's tariff requirement benefits competition by permitting a competitor, as business needs require, to evaluate the costs of using a tariffed UNE-P or EEL offering and avoiding most § 252 negotiation expenses,[28] against the potential costs of lengthy § 252 negotiations with the incumbent.

Tariffing is an essential state commission tool for advancing the scope of wholesale services offered by the incumbent. To be sure, not all state-ordered tariffs are automatically protected by the Act, especially if their content or structure in some way precludes or creates a complete bypass of § 252 procedures.[29] But tariffing *per se*, is not and cannot be preempted as a "contrary" procedure. The Act already deliberately gives the competitor the choice to resort to § 252 procedures in order to open the network of the monopoly incumbent, which has "no economic incentive, except for §§ 271 and 274, to afford competitors interconnection."[30] The tariff requirement is hardly more compulsory or intrusive.

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[28] The Commission has pointed out that, typically, notwithstanding the use of a tariff for pricing terms, § 252 contract may "wrap around" the core tariff bargain such collateral matters as ordering, billing, liability, and other business-to-business arrangements. Initial Brief of Defendants-Appellants Ave M. Bie, *et al.*, at 32, *Wisconsin Bell, Inc. v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003)(Nos. 02-3854 & 02-3897).

[29] The Commission concluded in the *OSS Final Decision* that, together, the two services at issue "cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." Ap-W. 57a.

[30] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499, 15528, ¶ 55 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th

The issue of federal preemption of ordinary state procedural means is essentially the same concern that prompted Supreme Court review in *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), a case involving federal preemption of state towing safety regulations. The Supreme Court held in that case that "[i]t is unlikely that Congress would preserve States' power to enact safety rules and, at the same time, bar the ordinary method by which States enforce such rules—through their local instrumentalities." *Ours Garage,* 536 U.S. at 436. In the context of the Telecommunications Act of 1996, it is equally unlikely that Congress preserved the jurisdiction of the states to act to promote competition, and, at the same time, barred the long-standing state commission use of tariffing as a means to make the incumbent's wholesale services more readily available to competitors.

By barring tariffing, however, the Seventh Circuit ruling forces all state pro-competition measures through the constrained funnel of private provider negotiations under § 252, thereby virtually eliminating a state commission's ability to proactively advance state competition policies consistent with the Act. Ironically, the court's unwarranted preemption of a state tariff requirement in favor of § 252 procedures extinguishes any real substantive policy-making preserved to the states by the Act. The Seventh Circuit's ruling effectively removes any positive policy incentives for the states[31] from Congress' provisions in the Act for

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Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[31] Without state policy opportunities, the state commissions might see more burden than benefit in administering § 252 arbitration and approval procedures.

encouraging state participation, especially §§ 251(d)(3), 252(e)(3), and 261(c). This case thus parallels *Ours Garage*: it is unlikely that Congress wrote provisions in the Act preserving state jurisdiction to promote competition, and, at the same time, impliedly barred the states' expected tariffing means of exercising that jurisdiction.

In sum, the preemption of state tariffing is inconsistent with the Act's preservation of state substantive policy jurisdiction in §§ 251(d)(3), 252(e)(3), and 261(c) to encourage state cooperation in administering the Act. The specific question is whether under the Act a state commission may order the tariffing of certain UNE services. But the more important question immediately behind the face of the challenge is whether the Act's cooperative federalism will be maintained as Congress designed it—especially if § 252 procedures are "exclusive" of any state method, tariff or otherwise, to advance competition. The Seventh Circuit's erroneous preemption ruling must be reviewed by this Court.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request grant of the writ of certiorari.

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS

The Supremacy Clause, U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

TITLE 47. Telegraphs, telephones, and radiotelegraphs
CHAPTER 5. Wire or radio communication; general provisions

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

(1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also

has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission

shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United

States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number. The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999.

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant

such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the

Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements.

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it

wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing,

billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate

telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

47 U.S.C. § 261. Effect on other requirements

(a) Commission regulations. Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations. Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements. Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 143 (1996).

§ 601(c)(1), Uncodified Note to 47 U.S.C. § 152. Applicability of Consent Decrees and Other Law.

(c) Federal, State, and local law.

(1) No implied effect. This Act and the amendments made by this Act [for full classification, consult USCS Tables volumes] shall not be construed to modify, impair, or

supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

WISCONSIN STATUTES (2001-02)

Chapter 133. Trusts and Monopolies

133.01 Legislative intent. The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Chapter 196. Regulation of Public Utilities

§ 196.01 Definitions. As used in this chapter and ch. 197, unless the context requires otherwise:

(1b) "Access service" means the provision of switched or dedicated access to a local exchange network for the purpose of enabling a telecommunications provider to originate or terminate telecommunications service. "Access service" includes unbundled local service provided to telecommunications providers.

. . . .

(3b) "Interconnection agreement" means an interconnections agreement that is subject to approval by the commission under 47 USC 252 (e).

§ 196.02 Commission's powers.

(1) Jurisdiction. The commission has jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient to its jurisdiction.

§ 196.03 Utilities charges and service; reasonable and adequate.

(1) Subject to s. 196.63, a public utility shall furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, water, telecommunications service or power produced, transmitted, delivered or furnished or for any service rendered or to be rendered in connection therewith shall be reasonable and just and every unjust or unreasonable charge for such service is prohibited and declared unlawful.

. . . .

(6) In determining a reasonably adequate telecommunications service or a reasonable and just charge for that telecommunications service, the commission shall consider at least the following factors in determining what is reasonable and just, reasonably adequate, convenient and necessary or in the public interest:

(a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.

(b) Promotion of consumer choice.

(c) Impact on the quality of life for the public, including privacy considerations.

(d) Promotion of universal service.

(e) Promotion of economic development, including telecommunications infrastructure deployment.

(f) Promotion of efficiency and productivity.

(g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

§ 196.04 Facilities granted other utilities; physical telecommunications connections; petition; investigation.

(1)(a) Definitions. In this section:

1. "Transmission equipment and property" means any conduit, subway, pole, tower, transmission wire or other equipment on, over or under any street or highway.

2. "Physical connection" means the number of trunk lines or complete circuits and connections, including connections by wire, optics, radio signal or other means, required to furnish reasonably adequate telecommunications service between telecommunications providers.

(b) Transmission equipment and property access. 1. Any person who owns transmission equipment and property shall permit, for reasonable compensation, the use of the transmission equipment and property by any public utility or telecommunications provider if public convenience and necessity require such use and if the use will not result in

irreparable injury to any owner or user of the transmission equipment and property or in any substantial detriment to the service to be rendered by the owner or user.

2. Every telecommunications utility shall permit physical connections to be made, and telecommunications service to be furnished, between any telecommunications system operated by it and the telecommunications toll line operated by another telecommunications provider, or between its toll line and the telecommunications system of another telecommunications provider, or between its toll line and the toll line of another telecommunications provider, or between its telecommunications system and the telecommunications system of another telecommunications provider if all of the following apply:

a. Public convenience and necessity require the connection.

b. The connection will not result in irreparable injury to the owners or other users of the facilities of the public utility making the connection.

c. The connection will not result in any substantial detriment to the service to be rendered by a public utility making the connection.

(2) If there is a failure to agree upon use of transmission equipment and property under sub. (1) or the conditions or compensation for the use, or if there is a failure to agree upon the physical connections or the terms and conditions upon which the physical connections shall be made, any public utility, any telecommunications provider or any other person interested may apply to the commission. If, after investigation, the commission determines that public convenience and necessity require the use or physical connections and that the use or physical connections will not

result in irreparable injury to the owner or other users of the transmission equipment and property or of the facilities of the public utility or in any substantial detriment to the service to be rendered by the owner or the public utility or other users of the transmission equipment and property or facilities, the commission, by order, shall direct that the use be permitted and that the physical connections be made. The commission shall prescribe reasonable conditions and compensation for the use and shall determine how and within what time the connections shall be made and by whom the expense of making and maintaining the connections shall be paid. An order under this subsection may be revised by the commission.

(4)(a) In this subsection:

1. "Cable operator" has the meaning given in s. 66.0419(2)(b).

2. "Sewerage system operator" means any of the following:

a. A municipality that operates a sewerage system under s. 66.0821.

b. A town sanitary district commission that operates a sewerage system under 60.77(4).

c. A city or village that obtains a sewerage system under s. 60.79.

d. A metropolitan sewerage district commission that operates a sewerage system under s. 200.11(2) or 200.31(1).

e. A public inland lake protection and rehabilitation district that exercises the powers of a town sanitary district under s.

33.22(3) and that operates a sewerage system under s. 60.77(4).

(b) If the parties cannot agree and the commission finds that public convenience and necessity or the rendition of reasonably adequate service to the public requires that a public utility, telecommunications provider, sewerage system operator or cable operator be permitted to extend its lines on, over or under the right-of-way of any railroad, or requires that the tracks of any railroad be extended on, over or under the right-of-way of any public utility, telecommunications provider, sewerage system operator or cable operator, the commission may order the extension by the public utility, telecommunications provider, sewerage system operator, cable operator or railroad on, over or under the right-of-way of the other if it will not materially impair the ability of the railroad, telecommunications provider, sewerage system operator, cable operator or public utility, on, over or under whose right-of-way the extension would be made, to serve the public. The commission shall prescribe lawful conditions and compensation which the commission deems equitable and reasonable in light of all the circumstances.

196.196 Telecommunications utility price regulation.

(2) Price regulation of intrastate access services. (a) Except as required to enforce this subsection, the commission may not review or set the rates for intrastate access services offered by price-regulated telecommunications utilities. This paragraph does not waive the tariff requirements of s. 196.219 (2m).

§ 196.199 Interconnections agreements.

(2) Commission powers. (a) The commission has jurisdiction to approve and enforce interconnection agreements and may do all things necessary and convenient to its jurisdiction.

196.20 Rules on service; changes in rates.

(1) The rate schedules of any public utility shall include all rules applicable to the rendition or discontinuance of the service to which the rates specified in the schedules are applicable. No change may be made by any public utility in its schedules except by filing the change as proposed with the commission. Except for a telecommunications utility, no change in any public utility rule which purports to curtail the obligation or undertaking of service of the public utility shall be effective without the written approval of the commission after hearing, except that the commission, by emergency order, may make the rule, as filed, effective from the date of the order, pending final approval of the rule after hearing.

§ 196.219 Protection of telecommunications consumers.

(1) Definitions. In this section:

(a) "Consumer" means any person, including a telecommunications provider, that uses the services, products or facilities provided by a telecommunications utility or the local exchange services offered by a telecommunications provider that is not a telecommunications utility.

(b) "Local exchange service" has the meaning given in s. 196.50 (1) (b) 1.

(2) Consumer protection. (a) Notwithstanding any exemptions identified in this chapter except s. 196.202, a

telecommunications utility or provider shall provide protection to its consumers under this section unless exempted in whole or in part by rule or order of the commission under this section. The commission shall promulgate rules that identify the conditions under which provisions of this section may be suspended.

(b) On petition, the commission may grant an exemption from a requirement under this section upon a showing that the exemption is reasonable and not in conflict with the factors under s. 196.03(6).

(c) On petition, the commission may grant an exemption from a requirement under this section retroactively if the application of the requirement would be unjust and unreasonable considering the factors under s. 196.03(6) or other relevant factors.

(d) If the commission grants an exemption under this subsection, it may require the telecommunications utility or provider to comply with any condition necessary to protect the public interest.

(2m) Access services. A telecommunications utility or provider shall provide access services under tariff under the same rates, terms and conditions to all telecommunications providers, except that a provider is not obligated to provide to competitors access to dedicated access services provided to end user customers as part of an interexchange service.

(3) Prohibited practices. A telecommunications utility with respect to its regulated services or any other telecommunications provider with respect to its offering of local exchange services may not do any of the following:

(a) Refuse to interconnect within a reasonable time with another person to the same extent that the federal communications commission requires the telecommunications utility or provider to interconnect. The public service commission may require additional interconnection based on a determination, following notice and opportunity for hearing, that additional interconnection is in the public interest and is consistent with the factors under s. 196.03 (6).

. . . .

(c) Impair the speed, quality or efficiency of services, products or facilities offered to a consumer under a tariff, contract or price list.

. . . .

(em) Refuse to provide a service, product or facility, in accord with that telecommunications utility's or provider's applicable tariffs, price lists or contracts and with the commission's rules and orders, to another telecommunications provider.

(f) Refuse to provide basic local exchange service, business access line and usage service within a local calling area and access service on an unbundled basis to the same extent that the federal communications commission requires the telecommunications utility or provider to unbundle the same services provided under its jurisdiction. The public service commission may require additional unbundling of intrastate telecommunications services based on a determination, following notice and opportunity for hearing, that additional unbundling is required in the public interest and is consistent with the factors under s. 196.03 (6). The public service

commission may order unbundling by a small telecommunications utility.

. . . .

(h) To the extent prohibited by the federal communications commission, or by the public service commission under rules promulgated consistent with the factors under s. 196.03 (6), give preference or discriminate in the provision of services, products or facilities to an affiliate, or to the telecommunications utility's or provider's own or an affiliate's retail department that sells to consumers.

. . . .

(l) Fail to provide, or to terminate, any telecommunications service as necessary to comply with the minimum standards of service established by the commission with respect to technical service quality, deposits, disconnection, billing and collection of amounts owed for services provided or to be provided.

. . . .

(4) Enforcement. (a) On the commission's own motion or upon complaint filed by the consumer, the commission shall have jurisdiction to take administrative action or to commence civil actions against telecommunications utilities or providers to enforce this section.

(b) The commission may, at its discretion, institute in any court of competent jurisdiction a proceeding against a telecommunications utility or provider for injunctive relief to compel compliance with this section, to compel the accounting and refund of any moneys collected in violation of this section or for any other relief permitted under this

chapter.

(4d) Unfair trade practice enforcement. Upon receipt of a notice issued under s. 100.208, the commission may order a telecommunications provider to cease offering the telecommunications service that creates the unfair trade practice or method of competition.

(4m) Civil actions. (a) Upon a finding of a violation of this section by the commission, any person injured because of a violation of this section by a telecommunications utility or provider may commence a civil action to recover damages or to obtain injunctive relief.

(b) Upon request of the commission, the attorney general may bring an action to require a telecommunications utility or provider to compensate any person for any pecuniary loss caused by the failure of the utility or provider to comply with this section.

196.37 Lawful rates; reasonable service.

(2) If the commission finds that any measurement, regulation, practice, act or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, or that any service is inadequate, or that any service which reasonably can be demanded cannot be obtained, the commission shall determine and make any just and reasonable order relating to a measurement, regulation, practice, act or service to be furnished, imposed, observed and followed in the future.

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Nos. 03-603 & 03-656

In the Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN, IN THEIR OFFICIAL CAPACITIES,
AND
WORLDCOM, INC.,

Petitioners,

V.

WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

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QUESTION PRESENTED

Whether the detailed procedures mandated by Congress for implementing interconnection obligations between competing telephone carriers via interconnection agreements formed by negotiation, arbitration, state commission approval, and federal court review preempt a state commission order imposing significant new interconnection and access obligations by an alternative method that bypasses those federal procedures.

RULE 29.6 STATEMENT

Respondent Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("SBC") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. This case concerns the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). The Act establishes a "new *federal* regime" that "fundamentally restructures local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 379 n.6 (1999) (emphasis in original). Under this regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal standards created by the Act. *Id.* at 377-378 & n.5. As this Court has explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6.

B. Interconnection Agreements. The key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252. Rather than rely on the historical regime of tariffing, Congress enacted these sections to establish carrier-to-carrier "interconnection agreements" as the federally mandated vehicles for implementing the market-opening duties set forth in section 251 of the Act. See *Iowa Utils. Bd.*, 525 U.S. at 371; see generally 47 U.S.C. §§ 251(b)-(c). Section 251(c)(3) of the Act requires an incumbent local exchange carrier ("LEC") like SBC to provide "access to network elements on an unbundled basis * * * in accordance with the terms and conditions of [its interconnection] agreement and the requirements of [section 251] and section 252." 47 U.S.C. § 251(c)(3).

The section 252 process involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) federal court review. At every stage of the process, federal law sets the pertinent standards.

In accordance with Congress's goal of creating a "de-regulatory" framework for local competition (see H.R. Conf. Rep. No. 104-458, at 113 (1996)), the Act makes interconnection a matter of private negotiation. At the beginning of the process, a competing LEC asks the incumbent LEC to negotiate an interconnection agreement. 47 U.S.C. § 252(a)(1). Both parties must "negotiate in good faith." *Id.* § 251(c)(1). The Act provides that "an incumbent [LEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). This right to conclude an agreement that does "not conform to all the detailed, specific requirements of § 251" reflects the Act's "clear preference" for "negotiated agreements" and "bestows a benefit to those carriers able to resolve issues through negotiation and compromise." *MCI Telecommunications Corp.* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001), cert. denied, 537 U.S. 941 (2002); see also *Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part and dissenting in part) ("[s]ection 252 sets up a preference for negotiated interconnection agreements"); *Verizon North, Inc.* v. *Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("private negotiation * * * is the centerpiece of the Act"), cert. denied, 123 S. Ct. 1649 (2003).

If the negotiation process does not produce a complete interconnection agreement, either party may (during a specified period) ask the state commission to arbitrate "open issues." 47 U.S.C. § 252(b). And the Act provides procedural and substantive guidelines governing arbitration. 47 U.S.C. §§ 252(b)-(d).

Following negotiation and arbitration, the parties must submit to the state commission any agreement they reach. 47 U.S.C. § 252(e)(1). The Act authorizes the state commission to "approve or reject the agreement" (*ibid.*), and provides specific "grounds for rejection" that vary depending on whether the agreement (or portion thereof) was adopted by negotiation or arbitration (*id.* § 252(e)(2)).

At the conclusion of the negotiation, arbitration, and approval process, the Act provides for federal court review of the state commission's determinations to ensure that they "meet[] the requirements of" sections 251 and 252. 47 U.S.C. § 252(e)(6). The Act also states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 47 U.S.C. § 252(e)(4). Thus, "subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place," and under that scheme "federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 329 (7th Cir. 2000), cert. denied, 531 U.S. 1132 (2001).

C. The Proceedings Below. On September 25, 2001, the Public Service Commission of Wisconsin ("PSCW" or "Commission") issued a Final Decision in which it ordered SBC to provide new combinations of network elements — including the "unbundled network element platform" or "UNE-P" — to competing LECs and to make those new combinations available "as a general proposition" through tariffs filed with the Commission. See Pet. App. 56a.[1] SBC

[1] "Pet. App." refers to the appendix to WorldCom's petition for certiorari (No. 03-603).

subsequently filed a petition for rehearing, which the Commission denied on November 14, 2001. *Id.* at 76a.

UNE-P is the "combination of several network elements that collectively permit the requesting competing carrier to provide traditional local voice telephone service." WorldCom Pet. 10. Using UNE-P, a competitor can lease at extremely low prices *all* elements of the network necessary to provide local service, and can thus re-sell SBC's local service. UNE-P is the primary means by which many of SBC's largest competitors — including WorldCom and AT&T — have chosen to compete with SBC. The Commission's order requires SBC to provide UNE-P, and allows competitors to demand UNE-P, without any negotiation, mediation, arbitration, or federal court review of the applicable prices, terms, and conditions, and indeed without any interconnection agreement provisions governing UNE-P at all. Instead, the Commission's order requires SBC to adhere, upon a competitor's demand, to a tariff composed of state-determined UNE-P terms and conditions.

SBC filed a complaint alleging that the Commission's order violated federal law by requiring that SBC provide those new combinations through a state tariff. The district court granted relief on the ground that the Commission's order "is inconsistent with and preempted by § 252 of the Telecommunications Act." Pet. App. 34a.

The district court explained that "Congress gave sweeping authority to the federal government to regulate telecommunications." Pet. App. 28a. The court further observed that "Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection." *Id.* at 29a. In these circumstances, it was appropriate to apply the well-established principle that "[e]ven if a state-imposed tariff furthers competition, as the commission's action seems to do, it may be preempted 'if it interferes with the *methods* by

which the federal statute was designed to reach [its] goal.'" *Ibid.* (emphasis in original) (citing, *inter alia*, *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992)).

The district court concluded that the Commission's order interferes with Congress's prescribed methods because it "requires [SBC] to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision." Pet. App. 29a. The court found that the Commission's order "interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff" and held that the "decision impos[ing] a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with § 252 of the Telecommunications Act." *Id.* at 33a-34a.

The Seventh Circuit, in an opinion authored by Judge Posner and joined by Judge Easterbrook, affirmed. The court ruled that "[t]he district court was right to hold that the state's tariffing requirement is preempted." Pet. App. 5a.

The court relied on *Gade* and Judge Boggs' decision for the Sixth Circuit in *Verizon North Inc.* v. *Strand*, 309 F.3d 935 (6th Cir. 2002), for the principle that "[w]hether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure." Pet. App. 2a-3a. Applying this principle, the Seventh Circuit agreed with the district court that this state-imposed tariff "interfere[s] with the procedures established by the federal act." *Id.* at 6a. Among other things, "[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." *Id.* at 7a (citing 47 U.S.C. § 25[2](b)(3)). "At

the very least," the court concluded, "the tariff requirement complicates the contractual route by authorizing a parallel proceeding." *Id.* at 6a.

The court rejected petitioners' argument that the State Commission's bypass of the federal Section 252 process was permissible because it allegedly "promotes the procompetitive policy of the federal act." Pet. App. 7a. "[T]o identify the policy underlying a statute and then run with it is a dangerous method of interpretation; it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Ibid.* (citing, *inter alia*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)). The Seventh Circuit held that "[t]he negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." *Ibid.*

REASONS FOR DENYING THE PETITIONS

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISION OF ANY OTHER COURT OF APPEALS

The only two courts of appeals that have addressed the question presented in this case (the Sixth and Seventh Circuits) have both held that state-law tariffing requirements imposing interconnection obligations on an incumbent carrier that bypass the interconnection agreement process prescribed by Congress are preempted. There is no contrary authority. Because there is no circuit conflict and the decision below is plainly correct, the question presented in the petitions does not warrant this Court's review.

Earlier this year, this Court denied a state commission's petition for a writ of certiorari — raising the same question

and the same inter-circuit conflict argument asserted again by petitioners — in the Sixth Circuit case that the Seventh Circuit followed here. See 123 S. Ct. 1649 (Mar. 31, 2003). In *Verizon North*, Judge Boggs, writing for a unanimous Sixth Circuit panel, invalidated a state-law tariff requirement imposed on an incumbent LEC on the ground that the tariff order "ignores and bypasses the detailed process for interconnection set out by Congress" in the 1996 Act. 309 F.3d at 944. The Sixth Circuit noted that "[t]he central question in preemption analysis is always 'whether Congress intended that federal regulation supersede state law.'" *Id.* at 940 (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)). In the several savings clauses contained in the 1996 Act, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Ibid.* (citing 47 U.S.C. § 261(b) (saving only state commission regulations that "are not inconsistent with the provisions of [the Act]") and *id.* § 261(c) (permitting additional state requirements "as long as the State's requirements are not inconsistent with [the Act]")).

Quoting its earlier decision in *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 923 (6th Cir.), cert. denied, 531 U.S. 957 (2000), the Sixth Circuit held that state commissions "administering the [1996 Act's] regulatory framework * * * must operate strictly within the confines of the statute." *Verizon North*, 309 F.3d at 940. The court observed that "state law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal" if the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *Ibid.* (citing, *inter alia*, *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)).

Applying these principles, the Sixth Circuit concluded that a state-law requirement to tariff a menu of unbundled network elements is preempted by federal law. In sections 251 and 252 of the Act, the Sixth Circuit explained,

"Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationships." *Verizon North*, 309 F.3d at 939. The court rejected the argument that this comprehensive federal procedure was just "one method" for implementing interconnection and access obligations and that states are "free to devise alternative methods under which competitors could acquire services and network elements from incumbents." *Id.* at 941. Rather, "the detailed procedural scheme — including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review — set out in § 252 is central to [the Act]," and should not "be evaded by state rule-making." *Ibid.* Because the Michigan commission's tariffing requirement "ignore[d] and bypasse[d] the detailed process for interconnection set out by Congress in the [1996 Act]," the Sixth Circuit invalidated the tariffing requirement as inconsistent with federal law. *Id.* at 944.

Relying on *Verizon North*, the Seventh Circuit reached the same conclusion here. As Judge Posner's opinion states, the Wisconsin commission "create[d] an alternative method by which a competitor can obtain interconnection rights" to access UNE-P and other network element combinations by "simply order[ing] Wisconsin Bell to file tariffs setting forth the price and other terms on which competitors such as WorldCom shall be entitled to interconnect with Wisconsin Bell's local telephone network." Pet. App. 2a. To evaluate the lawfulness of this state-law tariffing requirement, the Seventh Circuit applied the same legal standard that the Sixth Circuit utilized (*id.* at 2a-3a):

> Whether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure. The [1996 Act] is

> explicit that a state commission's regulations concerning interconnection are not preempted "if such regulations are not inconsistent with the provisions of [the Act]." [Citing 47 U.S.C. § 261(b) and *Verizon North*.] But if they are inconsistent, they are preempted. A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law. [Citing *Gade*.]

Applying these principles, the court held that "the state's tariffing requirement is preempted" because it "interfere[s] with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure." Pet. App. 5a-7a.

Petitioners attempt to manufacture a circuit conflict by pointing to two other decisions — a Sixth Circuit decision (*Michigan Bell* v. *MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003)) decided shortly after *Verizon North* and an earlier Tenth Circuit decision (*U.S. West Comms., Inc.* v. *Sprint Comms. Co.*, 275 F.3d 1241 (10th Cir. 2002)). That argument is wholly unavailing. Neither decision addressed the question presented in this case and *Verizon North*.

To begin with, the panel in *Michigan Bell* did not purport to disagree with the governing circuit law set forth in *Verizon North*. To the contrary, the Sixth Circuit in *Michigan Bell* applied the same legal standards it had applied a mere four months earlier in *Verizon North* (and the same legal standards applied by the Seventh Circuit in this case). See 323 F.3d at 358-360. In applying those standards, the Sixth Circuit was careful to "distinguish" *Michigan Bell* from *Verizon North*. *Id.* at 360. The court acknowledged the comprehensive federal system for the implementation of the interconnection duties created by the Act, but observed that "the Act is silent with respect to *preexisting* state duties." *Id.*

at 359. The court then noted that in *Michigan Bell* "the tariffs preexisted the interconnection agreement," *id.* at 360, and held that "in this particular instance" the pre-existing tariff allowing MCI to "transmit resale orders" by fax may be enforced without "frustrat[ing] the purposes of the Act," *id.* at 361.[2]

The fact that no court has identified a conflict is hardly surprising in view of the unusual facts and narrow holding in *Michigan Bell*. Contrary to WorldCom's suggestion, *Michigan Bell*, unlike this case, did not involve a tariff that imposed substantive interconnection obligations on an incumbent carrier outside the section 252 agreement process. Rather, the case concerned merely the manner of "transmit[ting] resale orders." 323 F.3d at 361. At issue in *Michigan Bell* was a *pre-existing* state tariff under which competitors were able to order wholesale services for resale via fax. See PSCW Pet. 15 (acknowledging that *Michigan Bell*, unlike the instant case, "concerned a pre-Act tariff requirement"). The court merely upheld the Michigan Commission's determination, as a matter of state contract law, that the parties' section 252 interconnection agreement did not "preclude use of the state tariff." 323 F.3d at 357.

The court's holding that the "right of the Commission to enforce pre-existing tariffs as state regulation is consistent with the Act" (*id.* at 359) followed directly from its conclusion that the parties' section 252 interconnection agreement did not preclude reliance on such tariffs. As the

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[2] Even the dissenting judge in this case did not suggest that the majority opinion conflicted with *Michigan Bell*. He read *Michigan Bell* and *Verizon North* as involving applications of the same legal rule to different facts, Pet. App. 10a-11a, and concluded that the Seventh Circuit majority "appears to echo the errors of the Sixth Circuit, which has similarly justified preemption based on interference with § 252's procedures." *Id.* at 10a.

court explained, "*Assuming that the interconnection agreement did not preclude MCI's placing resale orders under Ameritech's tariff obligations*, the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition." *Id.* (emphasis added). The court concluded that "[a]llowing the state tariff *in this particular instance* to stand alongside the [interconnection] Agreement does not frustrate the purposes of the Act" (*id.* at 361, emphasis added) because it believed that it was simply giving effect to the parties' interconnection agreement as it was written. And, even if correct, that conclusion in no way conflicts with the holdings in this case and *Verizon North* that a state commission may not impose access and interconnection obligations on an incumbent LEC without regard to the detailed interconnection agreement procedures prescribed by Congress.

Petitioners' attempt to contrive a conflict with the Tenth Circuit fares no better. The Tenth Circuit's *Sprint* decision is the same decision that the Michigan Commission pointed to when it sought a writ of certiorari in the *Verizon North* case, presenting the same question, making the same arguments, and alleging the same "conflict." See Petition for a Writ of Certiorari, No. 02-1227 (available at 2003 WL 21699546). That petition was denied without dissent. 123 S. Ct. 1649 (Mar. 31, 2003). The Tenth Circuit's decision does not "conflict" with this case any more than it did with *Verizon North*.

While petitioners assert that *Sprint* "*implies* that tariff offerings are valid," PSCW Pet. 16 (emphasis added), it is obvious that the Tenth Circuit never addressed that issue. *Sprint* involved review of a Colorado commission arbitration under § 252 of the Act in which the Colorado commission approved interconnection agreement provisions allowing a competitor to purchase interconnection services on terms set by the agreement or on terms contained in the incumbent LEC's tariff. The parties to that case waived any argument

that it was impermissible for the State to require Qwest to tariff its interconnection and access offerings. Indeed, the Tenth Circuit twice noted that "[i]t is uncontroverted that Qwest is required by Colorado law to file tariffs disclosing the prices and terms for its services," 275 F.3d at 1245 n.4, and "MCI, Sprint and Qwest agree that, under Colorado law, a CLEC has the right to purchase services from an ILEC pursuant to the ILEC's tariffs without negotiating an interconnection agreement." *Id.* at 1250 n.10. No party questioned those requirements. Rather, the issue confronting the Tenth Circuit was, *assuming* that the state-law tariffing requirement was lawful, whether the 1996 Act prohibited a state commission from approving an interconnection agreement that allowed a competing LEC to "mix and match" terms and conditions from the interconnection agreement and the tariff. While the Tenth Circuit answered the latter question in the affirmative, it did not address, either explicitly or impliedly, the question resolved in this case and *Verizon North* — namely, whether a state commission may simply disregard the interconnection agreement process mandated by the Act in imposing interconnection and access obligations.

Finally, petitioners attempt to bolster their assertions by pointing to the FCC's *Texas Preemption Order* (*In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997), aff'd, 164 F.3d 49 (D.C. Cir. 1999)). See PSCW Pet. 16-17; WorldCom Pet. 22. The FCC's *Texas Preemption Order* is simply not on point.

The question before the FCC was whether a state-law requirement in Texas was preempted because it was "inconsistent with the [Act's] wholesale pricing standards," or "would have the effect of prohibiting carriers from reselling incumbent LEC services in violation of section 253(a) of the Act." *Texas Preemption Order* ¶ 131. The FCC concluded that the tariff was not invalid for either reason, but said *nothing* about the issue at stake in this case.

As the Sixth Circuit observed, the question whether competitors could acquire services from incumbents pursuant to state commission mandates imposed outside the Act's comprehensive federal system of negotiation and arbitration "is not discussed, relied upon, or even challenged in [the *Texas Preemption Order*]." *Verizon North*, 309 F.3d at 944 n.5.[3]

When the FCC later addressed the question presented here, it agreed with the Sixth and Seventh Circuits. In the *Virginia Preemption Order* (*In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 (2002)), the FCC held that where carriers "ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier *cannot use tariffs to circumvent* the Commission's determinations under section 252 or the right to federal court review under section 252(e)(6)." *Id.* ¶ 602 (emphasis added). Verizon (the incumbent) sought to "establish tariffs as the primary, central source for applicable prices," *id.* ¶ 594, and WorldCom opposed Verizon, arguing: "Congress chose not to rely on the historically tariffed regime with respect to interconnection and network element prices. Instead, it set up an alternative, detailed process, requiring negotiation, arbitration, approval, regulatory review, and federal court review, to ensure that the resulting agreement complies with federal law." *Id.* ¶ 592. The FCC agreed with WorldCom, holding that Verizon could not use tariffs to circumvent the section 252 process. *Id.* ¶¶ 599-602. Indeed, the FCC held that while "parties are certainly free to agree that services will be provided pursuant to tariffs," that is not the case "[w]here the parties fail to agree." *Id.* ¶ 602. As the district court below noted, "under the regime proposed in this case,

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[3] The FCC found it significant that parties challenging the Texas tariff were not precluded from "invok[ing] sections 251 and 252 of the Act." *Texas Preemption Order* ¶ 139. Here, by contrast, SBC *is* precluded from invoking those sections to the extent a competitor opts for the PSCW-imposed tariff.

the parties *do not agree* that services will be provided pursuant to a tariff." Pet. App. 32a.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS

A. The decision in this case is fully consistent with this Court's decisions construing the 1996 Act and well-established preemption principles. In *Iowa Utils. Bd.*, this Court stated that "the question * * * is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With respect to the matters addressed by the 1996 Act, it unquestionably has." 525 U.S. at 378 n.6. With respect to "the state commissions' participation in the administration of the new *federal* regime," it is federal law that "draw[s] the lines to which the [States] must hew." *Id.* (emphasis in original). One of the most significant "matters addressed by the 1996 Act" is the interconnection agreement process by which interconnection rights and obligations must be established. Attempts to bypass and undermine that process are invalid.

This Court repeatedly has observed that "[p]re-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade*, 505 U.S. at 98; see also *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, * * * state law is naturally preempted to the extent of any conflict with a federal statute."). The doctrine of implied preemption applies where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). And "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by

examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Further, it is well settled that federal law preempts not only state law that conflicts with federal substantive standards, but also trumps state action that "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade*, 505 U.S. at 103 (emphasis added). As this Court held, because "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," federal preemption extends to "'specially designed procedures * * * to obtain uniform application of [Congress's] substantive rules.'" *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971) (quoting in part *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491 (1953)). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means" (*Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995)), and courts and administrative agencies alike "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218, 231 n.4 (1994). In short, where "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy," state action that conflicts with or undermines Congress's chosen "technique of administration" is preempted. *Amalgamated*, 403 U.S. at 287-288.

State commission action that attempts to bypass the federally-mandated procedures for imposing interconnection and access requirements run afoul of these well-established principles. In the 1996 Act, Congress not only created new substantive obligations, but created detailed procedural mechanisms by which those obligations are to be

implemented. Among other things, the Act requires an initial period of negotiation (47 U.S.C. § 252(a)(1)); permits incumbent LECs to "negotiate and enter into a binding agreement * * * without regard to" the substantive requirements set forth in sections 251(b)-(c) (*id.*); establishes a precise timetable and specific standards for arbitrating any disputed issues (*id.* § 252(b)-(d)); places restrictions on the issues that state commissions may consider in arbitrating disputed issues (*id.* § 252(b)(4)(A)); imposes specific time limits on the state commission's decision (*id.* § 252(b)(4)(C), (e)(4)); and provides for exclusive federal district court review of state commission actions relating to interconnection agreements (*id.* § 252(e)(4) and (6)).

Section 252 unmistakably establishes a comprehensive procedure for implementing federal telecommunications policy through interconnection agreements. See *Verizon North*, 309 F.3d at 939 ("Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationship"). In this self-contained federal framework — consisting of negotiation, arbitration, and approval, all leading up to federal judicial review — Congress clearly mandated "the methods by which the federal statute [is] designed to reach [its] goals." *Gade*, 505 U.S. at 103. As Congress intended, these "specially designed procedures" (*Amalgamated*, 403 U.S. at 287) result in detailed section 252 agreements that constitute the "binding" statement of the parties' respective interconnection rights and obligations. 47 U.S.C. § 252(a)(1).

B. Petitioners argue that Congress has not explicitly preempted state tariffing requirements, and point out that the Act contains several "savings clauses." WorldCom Pet. 23-24; PSCW Pet. 19-20. But this Court has warned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from

a consideration of the whole federal regulatory scheme." *United States* v. *Locke*, 529 U.S. 89, 105 (2000). A savings clause "does not bar the ordinary working of conflict pre-emption principles," and courts must "decline[] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 869-870.

In fact, in the savings clauses of the 1996 Act, Congress preserved state regulation *only to the extent that it is not inconsistent with the federal Act.* 47 U.S.C. §§ 251(d)(3), 261(b), 261(c); Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (1996). As Judge Boggs noted, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Verizon North*, 309 F.3d at 944. For instance, petitioners rely on section 251(d)(3) (*see* WorldCom Pet. 23; PSCW Pet. 21), but that clause permits only state rules that are *both* "consistent with the requirements of this section" *and* "do[] not substantially prevent implementation of the requirements of this section *and the purposes of this part.*" (Emphasis added.) One of the primary "purposes of this part" (which includes sections 251 through 261) is the establishment of a comprehensive federal mechanism for implementing interconnection and access rights and obligations through interconnection agreements. The PSCW attempted to jettison that process with respect to one of the most hotly-disputed interconnection and access issues confronting carriers – the terms and conditions of access to UNE-P.

Similarly, section 261(b) permits the enforcement of state regulation "not inconsistent with the provisions of this part," and section 261(c) allows state regulation that is "necessary to further competition * * * as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part." As the FCC recently stated in its *Triennial Review Order*, "[s]ections 261(b) and (c) generally preserve state authority to take action pursuant

to state law, *provided that such action is consistent with the Act and our federal framework.*" *Triennial Review Order* ¶ 180 (emphasis added).[4] And section 251(d)(3) permits additional state regulation "only to the extent that state laws or regulations do not conflict with or frustrate the Act and its purposes or substantially prevent the federal *implementation* regime." *Id.* ¶ 186 (emphasis added).

Petitioners also invoke section 601(c) of the Act, an uncodified "savings clause" that provides that the Act "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143. In the other savings clauses, of course, Congress made clear that the states are forbidden from regulating in a manner inconsistent with the Act, and "expressly so provided." Section 601(c) adds nothing to the ordinary preemption principles at issue here. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("neither an express pre-emption provision nor a saving clause 'bars the ordinary working of conflict pre-emption principles'"); *Geier*, 529 U.S. at 869 ("the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles") (emphasis in original).

Petitioners further assert that the Seventh Circuit ignored the "presumption" against preemption where a State acts "within the boundaries of traditional state regulatory authority." WorldCom Pet. 27; see also PSCW Pet. 19. But petitioners ignore this Court's admonition that "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States."

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003), available at 2003 WL 22175730 ("*Triennial Review Order*").

Iowa Utils. Bd., 525 U.S. at 379 n.6. Accord *Bell Atlantic-Pennsylvania*, 271 F.3d at 511. Thus, with respect to the "matters addressed" by the Act, Congress "has precluded all other regulation [of telecommunications] except on its terms" — and certainly has precluded conflicting requirements. *Illinois Bell*, 222 F.3d at 343. Accord *GTE North*, 209 F.3d at 923 ("in administering the [Act's] regulatory framework," state commissions "must operate strictly within the confines of the statute"). The implementation of interconnection and access obligations is one of the most significant "matters addressed by the 1996 Act," and thus state regulators are not entitled to any presumption against preemption with respect to such matters. *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. See *AT&T Communications* v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636, 641 (5th Cir. 2001) ("the Court in *Iowa Utilities*, in answer to arguments of the dissenters relying on the presumption against preemption of state regulatory power, responded that the 1996 Act clearly manifested Congress's intent to supplant traditional state police power regulation of local telecommunications competition"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946-947 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law" (citing *Iowa Utils. Bd.*, 525 U.S. at 379 n.6)).

Similarly, the PSCW's assertion that the principle of *Gade* (that state action is preempted if it "interferes with the methods by which the federal statute was designed to reach [its] goal," 505 U.S. at 103) is inapplicable here because Congress gave state commissions "a 'key role in the regulatory scheme'" is plainly wrong. See PSCW Pet. 22. That "key role" consists of arbitrating, approving, and overseeing interconnection agreements — the very role the PSCW attempted to sidestep with its tariffing requirement. While state commissions may enforce consistent state

regulation when undertaking that role in the interconnection agreement process, this does not mean they can bypass that process altogether. Further, the FCC applied *Gade* in the very FCC decision that petitioners attempt to rely on here — the *Texas Preemption Order*. *Texas Preemption Order* ¶ 50.[5]

C. The PSCW also invokes section 252(f) of the Act, which allows an incumbent to submit for state commission approval a generic "statement of generally available terms ("SGAT"), and argues that that section "clearly contemplates the co-existence of tariffs and interconnection agreements." PSCW Pet. 21-22. It does nothing of the sort.

To begin with, section 252(f)(1) states that an incumbent "*may* prepare and file" an SGAT. 47 U.S.C. § 252(f)(1) (emphasis added). Nothing in the Act *requires* an incumbent to file an SGAT or allows a state commission to force it to do so. Moreover, even if section 252(f) were an alternative *federal statutory* vehicle for implementing the local competition provisions of the 1996 Act (which it is not), that would provide no support for the proposition that a *state commission* can use an *extra-statutory state method* of implementing those provisions. Indeed, as the Sixth Circuit correctly held in *Verizon North*, "§ 252(f) actually illustrates why [a] tariff procedure is inconsistent with, and therefore preempted by, the Act." 309 F.3d at 943. In particular (*ibid.*),

> the same subsections of § 252 provide the same carefully-designed review process for a § 252(f) statement as they do for an interconnection

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[5] Petitioners' assertion that the Seventh Circuit somehow erred in accepting a "facial" challenge to the PSCW's order "irrespective of the terms of any interconnection agreement" (WorldCom Pet. 26-27) is inexplicable. There is no valid application of the PSCW's order because the PSCW itself attempted to impose interconnection and access obligations irrespective of the interconnection agreement procedures prescribed by Congress.

> agreement – the statement is to be presented to the relevant state commission for approval, the FCC can step in to approve the statement if the state commission does not act, and the state commission's actions are subject to federal court review. * * * [The] tariff procedure bypasses all of this procedure.

Thus, "nothing in the language of § 252(f) suggests that it provides an alternative route around the interconnection agreement process for competitors of Bell companies that have filed § 252(f) statements." *Verizon North*, 309 F.3d at 942-943.[6]

In any event, section 252(f) plainly is *not* a method of implementing the local competition provisions of the Act. Rather, as the Seventh and D.C. Circuits have explained, a section 252(f) SGAT is simply a vehicle that may be available under limited circumstances to at Bell Operating Company ("BOC") to facilitate its application to the FCC for approval to provide interLATA *long distance service* to the BOC's own customers. *Illinois Bell*, 222 F.3d at 329-330; *AT&T Corp.* v. *FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). In other words, an SGAT is the procedure by which a BOC demonstrates how it *would offer to provide* access and interconnection *if* any new entrant were to make a request to commence negotiation of an agreement under section 252.

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[6] Petitioners also quibble with Judge Posner's observation that the commission has undermined the bargaining process by forcing SBC to state its "reservation price." See WorldCom Pet. 24-25. That is a red herring. The fundamental issue here is whether state requirements that "interfere with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure" are preempted. Pet. App. 6a-7a. Both the Seventh and Sixth Circuits answered that question in the affirmative and no other court has disagreed.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT PREVENT STATES FROM IMPLEMENTING LOCAL POLICIES

Petitioners suggest that the Seventh Circuit's decision is inconsistent with "Congress' invitation to the states to participate in the Act's cooperative federalism," which includes "the opportunity for state commissions to engage in substantive policy making under state law to promote competition." PSCW Pet. 23-24. State commissions *are in fact* participating at "Congress' invitation," but they must play by Congress's rules. Cooperative federalism means, among other things, that states cooperate and work within the framework and "specially designed procedures" fashioned by Congress. See *Amalgamated*, 403 U.S. at 287.

There is no merit to the PSCW's suggestion that without the ability to impose tariffed interconnection and access obligations by fiāt, state commissions are powerless to effectuate local policies. Congress not only protected the ability of state commissions to engage in substantive policy-making, but, to the extent that policy-making concerns the prices, terms and conditions of incumbent-to-competitor interconnection and access, expressly provided the "means" by which state commissions can (and must) implement those policies — in review and approval of interconnection agreements. 47 U.S.C. § 252(e)(3). The Seventh Circuit recently confirmed the power of the States to promulgate substantive rules that are consistent with section 252 procedures where "federal law leaves a gap-filling role for the states." *AT&T Communications of Illinois, Inc.* v. *Illinois Bell Tel. Co.*, __ F.3d __, 2003 WL 22533675, at *6 (7th Cir. Nov. 10, 2003). State commissions are by no means powerless if denied the ability to evade the interconnection agreement procedures created by Congress: *every* interconnection agreement must be reviewed and approved by a State commission. *Id.* § 252(e)(1) ("Any interconnection agreement adopted by negotiation or

arbitration shall be submitted for approval to the State commission"). Even agreements adopted by negotiation can be rejected by a state commission if it concludes that the agreement "discriminates" against other carriers or that "the implementation of such agreement * * * is not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A)(i)-(ii).[7]

The only alleged "benefit" of imposing access and interconnection obligations via tariffs rather than through the procedures mandated by Congress that petitioners are able articulate is avoidance of the prospect of "delay" in the formation of an interconnection agreement. Tariffs, petitioners assert, allow a competitor to "avoid[] most § 252 negotiation expenses." PSCW Pet. 27. But Congress already created a procedure to allow new entrants to secure a contract quickly and efficiently. Section 252(i) of the Act allows competitors to opt in to the terms and conditions of an agreement already approved by the state commission, so that

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[7] This case bears no resemblance to *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), relied on by petitioners. *Ours Garage* involved provisions of the Interstate Carrier Act that expressly preempted state *economic* regulation by both "State[s]" and their "political subdivision[s]," while expressly preserving the power of "State[s]" to exercise safety regulatory authority. *Id.* at 428. The issue was whether States' political subdivisions were preempted from exercising safety regulatory authority. The Court held they were not because there was no clear statement from Congress that it intended to override the States' traditional prerogative to delegate authority to their political subdivisions — the "ordinary method by which States enforce such rules." *Id.* at 428, 436. This case does not involve any dispute over the power of the states to delegate regulatory authority. Further, under the 1996 Act, Congress did not preserve state tariffing requirements. And it preserved state regulation only to the extent it is consistent with the Act. Congress specified the methods that state commissions can use to promote competition — interconnection agreement arbitration, review, and approval.

a carrier need not engage in "de novo" negotiations. Further, the 1996 Act requires all carriers, including incumbents, to "negotiate in good faith" (47 U.S.C. § 251(c)(1)), and both the FCC and state commission are empowered to resolve complaints (and impose penalties) regarding violations of that duty — including "actions that are intended to delay negotiations." *First Report and Order*, 11 F.C.C.R. 15,499 ¶¶ 143, 154 (1996).

The present case disproves petitioners' argument that state-imposed tariffs reduce the "time delays" associated with the section 252 process. The Wisconsin proceeding at issue was instituted on December 15, 1999. Pet. App. 39a. The PSCW issued its Final Decision on September 25, 2001, *more than 21 months later*, noting that "[t]his proceeding has been complex and time-consuming, and more is yet to come." *Id.* at 38a-39a. On November 14, 2001, nearly *23 months* after the proceeding was initiated, the PSCW issued its Order Denying Rehearing. *Id.* at 76a. Under the procedures mandated by Congress, by contrast, state commissions are *required* to complete any arbitration "not later than 9 months after the date on which" the competitor first requested to negotiate the interconnection agreement. 47 U.S.C. § 252(b)(4)(C). Because no party can request arbitration until the 135th day after the negotiation request (*id.* § 252(b)(1)), the *longest* time a state commission could have to complete an arbitration is approximately *4½ months*.

Moreover, the FCC has made clear that concerns about "lag[s]" in negotiating interconnection agreements do not justify "interfering with the contract process." *Triennial Review Order* ¶ 701. In the *Triennial Review* proceeding, several carriers urged the FCC to "unilaterally change all interconnection agreements" to reflect the new FCC rules established in that proceeding, "to avoid any delay associated with renegotiation of contract provisions." *Ibid.* The FCC refused, holding that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of

section 251 and section 252." *Ibid.* In accordance with Congress's desire to create a de-regulatory framework for local telecommunications competition based on private negotiation, the FCC held that "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." *Id.* ¶ 700. The tariff order at issue here impermissibly denies incumbent carriers this opportunity.

Petitioners baldly assert that "[t]he Commission's tariff requirement benefits a competitor without harming the incumbent" (PSCW Pet. 26), pointing to the dissent's assertion in this case that SBC's pricing is already "quasi-public" and thus SBC is not harmed by disclosure of its "reservation price" in a tariff. But that is far from the only harm the tariffing requirement inflicts.

The tariff order here creates an unfair and unbalanced situation in which competing LECs have full discretion to use tariffs in place of an interconnection agreement, or negotiate an agreement, or pick and choose the parties' rights and obligations from each. But incumbent LECs would always have a duty to negotiate binding section 252 contracts and could not simply refer competing LECs to tariffs as a complete displacement of all or any part of the interconnection agreement process. Congress did grant "'most promiscuous rights' * * * to competing carriers vis-à-vis the incumbents," *Iowa Utils. Bd.*, 525 U.S. at 397, which are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Comms., Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). But the system designed by Congress is not without countervailing checks and balances. As Judge Posner explained, Congress did not

allow competing carriers to avoid the same interconnection agreement process to which incumbents must adhere.

Once the negotiation process is triggered, an incumbent like SBC has both duties and rights under the Act's local competition provisions. Among other things, an incumbent LEC has a "right to fulfill its duty [to interconnect] by negotiating the terms of such agreements on its own, without regard to the 1996 Act's substantive standards" and "to enforce its right to a negotiated, binding interconnection agreement" before the state commission and the federal courts. *Verizon Md., Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 551 n.3, 555 (D. Md. 2002). Once negotiation is triggered, an incumbent also has a right to invoke state commission arbitration of any disputed issues. 47 U.S.C. § 252(b)(1). In short, in sections 251 and 252 of the Act, Congress established a balanced approach based on its "clear preference" for negotiated interconnection agreements. *Bell Atlantic-Pennsylvania*, 271 F.3d at 500. Tariffing requirements of the kind at issue here turn that into a one-way street, allowing state commissions — at the behest of competing LECs — to impose new and even conflicting interconnection obligations outside Congress's prescribed procedures and without the section 252(e)(6) review contemplated by Congress.

While WorldCom avers that the Seventh Circuit's decision "directly and substantially impairs the ability of MCI and other competing carriers to operate their business" (WorldCom Pet. 28), nothing in that decision prevents carriers from doing exactly what they have done for the last seven years: negotiate and arbitrate interconnection agreements with incumbents.[8] Incumbent and competing

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[8] While WorldCom (at 30) expresses "confusion about the enforceability of * * * freely-negotiated [interconnection agreement] provisions" that allow a competitor access to tariffs, that is an issue of contract interpretation for the state commissions.

LECs have entered into thousands of interconnection agreements. Under those agreements competing carriers have managed to steadily increase their market share, adding several *million* new lines each year. See FCC Wireline Competition Bureau, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 12, 2002, Table 1 (June 2003) (available at http://www.fcc.gov).

The Commission's suggestion that state-imposed tariffs are preempted only if they operate to "preclude[] or create[] a *complete* bypass of § 252 procedures" (PSCW Pet. 27) is erroneous. The Commission believes that it is permissible to side-step Congress's procedural design and impose "core tariff" terms governing the most important aspects of carrier-to-carrier relations (like access to UNE-P) by fiat as long as a state commission allows the incumbent LEC to negotiate *some* "collateral matters" of the carrier-to-carrier relationship (*i.e.*, when and where the bills are to be sent). *Ibid.* But even if the Commission's tariffing order only bypassed Congress's procedures with respect to the core rights and duties created by sections 251 and 252 (the terms and conditions governing access to network elements — which WorldCom acknowledges is "'[f]oremost' among the[] obligations" created by the Act, see WorldCom Pet. 5), while leaving some administrative issues for negotiation, that would not make it any less inconsistent with the federal regime. In any event, the Commission's tariff clearly effects a "complete bypass of § 252 procedures" with respect to the core interconnection matters addressed by that tariff, wiping out the good faith negotiation, arbitration, and review process mandated by Congress.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-656

In The

Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,
Petitioners,

v.

WISCONSIN BELL, INC., d/b/a Ameritech Wisconsin, *et al.*,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AMICUS CURIE BRIEF SUPPORTING PETITIONER WISCONSIN PUBLIC SERVICE COMMISSION

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QUESTION PRESENTED

The Telecommunications Act of 1996 ("Act") creates a national framework to develop local telecommunications competition. Two key provisions in that legislation, 47 U.S.C. §§ 251 & 252, created a critical State oversight role for the negotiation and arbitration of interconnection agreements and the development of statements of generally available terms and conditions ("SGATs"), pursuant to which competing local exchange carriers ("CLECs") can gain entry through interconnection, resale, or access to the incumbent local exchange carriers' ("ILECs") unbundled network elements. In the Act, Congress specified that (1) preemption is not to be implied, 47 U.S.C. §152 (§ 601, *codified in* notes) and (2) State commissions may implement pro-competition State measures consistent with the Act. 47 U.S.C. § 251(d)(3) & § 261.

The question presented is whether a State commission order that requires, without setting rates, terms, or conditions, the tariffed offering of certain combinations of an incumbent provider's unbundled network elements is consistent with the Act's provisions which specifically allow the creation of SGATs and expressly reserves existing State authority to enact additional pro-competitive measures.

PARTIES TO THE PROCEEDING & RULE 29.6 DISCLOSURE

The petitioners are Ave M. Bie, Burneatta Bridge, and Robert M. Garvin, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. One original Commissioner defendant, Joseph P. Mettner, left office and was replaced by Burneatta Bridge on January 6, 2003.

Respondents in the case are Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (n/k/a SBC Wisconsin), the plaintiff-appellee, and WorldCom, Inc., an intervening defendant-appellant.

WorldCom, Inc has separately filed a Petition seeking a Writ of Certiorari on the same case (U.S. 03-603).

Pursuant to Supreme Court Rule 29.6, Amicus Curiae the National Association of Regulatory Utility Commissioners ("NARUC") states as follows: NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC.

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IN THE

Supreme Court of the United States

No. 03-656

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,

Petitioners,

v.

WISCONSIN BELL, INC., d/b/a Ameritech Wisconsin, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AMICUS CURIAE BRIEF SUPPORTING PETITIONER WISCONSIN PUBLIC SERVICE COMMISSION

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), a quasi-governmental organization founded in 1889, submits this brief in support of Petitioners Ave Bie, Burneatta Bridge, and Robert Garvin,

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[1] As per U.S. Sup. Ct. Rule 37(2)(a), (5), & (6), 28 U.S.C. (2003), NARUC (i) is filing signed forms from all parties granting consent for NARUC to file this brief and the required proof of service in this docket, and (ii) states that no counsel for another party authored the brief in whole or in part or made a monetary contribution meant to underwrite preparation of this specific brief.

Commissioners of the Public Service Commission of Wisconsin, in their official capacities ("Wisconsin").

NARUC, which Congress calls "*the national organization of the State commissions*", 47 U.S.C. § 410(c) (1971), presents the collective interest of State commissions charged with regulating conditions of service of the intrastate operations of, *inter alia*, telephone utilities in all fifty States and several U.S. territories. Both Congress and the Federal courts have long recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions.[2]

Each of NARUC's members, like Petitioner Wisconsin, is a "State commission" as defined by Congress[3] under Section 252 of the Telecommunications Act of 1996.[4]

NARUC's member commissions have a vital interest in whether this Court accepts the Wisconsin petition for review. The Seventh Circuit decision that is the subject of the Wisconsin petition seriously undermines State

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[2] See, e.g., 47 U.S.C. § 254 (1996); *United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

[3] 47 U.S.C. § 153(41).

[4] Pub. L. 104-104, 110 Stat. 56 (1996)(hereinafter referenced as "1996 Act" or "Act"). The Act is codified throughout Title 47 of the United States Code. References to the Act are to relevant sections of Title 47 and are denoted by the symbol "§," except as otherwise noted.

Commissions' ability to promote competition within their respective jurisdictions. It also heightens the prospects for additional appeals of other NARUC member commissions' existing practices. Duplicative additional litigation of the issues raised in this docket is inevitable in other circuits if the Court does not grant certiorari. By sustaining the facial challenge to the State-law tariffing requirement, the Seventh Circuit decision creates a clear split among the circuits.[5] The Seventh Circuit majority believes Congress intended the interconnection agreement process to be the only procedure that States can employ to promote local competition. See *Appendix of WorldCom's Petition for a Writ of Certiorari* (U.S. 03-603) at 5a-7a. It therefore found that the 1996 Act preempts Wisconsin's effort to "create an alternative method by which a competitor can obtain interconnection rights." *Id.* at 2a.

State commissions will be compelled to defend their decisions because of this split in authority combined with the fact that 7th Circuit's ruling is, on its face, so clearly at odds with both the express reservation of State authority in 47 U.S.C. § 251(d)(3) and specific provision in 47 U.S.C.

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[5] The Seventh Circuit's decision conflicts with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), which held that allowing competing carriers to take services from incumbent carriers' tariffs is not preempted by the negotiation and arbitration provisions of the 1996 Act. *See* 275 F.3d at 1249-51. It also conflicts with an order by the expert agency charged with interpreting the Act's provisions. See the FCC's order in *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"), in which the FCC held that the 1996 Act did not preempt a State tariff as long as new entrants remained free to invoke the Act's negotiation and arbitration provisions. *Id.* ¶ 138-139.

§ 252(f) allowing, for certain ILECs, the tariff-like Statement of Generally Available Terms.[6]

Wisconsin is not alone.[7] Granting the writ petition and issuing a decision in the instant case will provide the

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[6] Some of the Court decisions effectively raise form over substance. The *MCI Telecommuns. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999) decision held the structure of tariffs improperly permitted "off the rack" ordering of services that dispensed with interconnection agreements altogether. After the decision, the Oregon commission, given their obligations under the federal Act, went ahead to establish "UNE prices". However, because of the Court's decision, instead of requiring a "tariff", that Commission said the listed prices ". . .established by the Commission shall function as "initial" or "default" prices . . [and] . . shall be incorporated in interconnection agreements arbitrated by the Commission under the terms of the Act," unless the parties agree to different prices, or a parties could demonstrates there are "special costs" warranting a UNE price different from that established." See, *In the Matter of the Investigation into Compliance Tariffs filed by U S WEST Communications, Inc., Advice Nos. 1661, 1683, 1685, and 1690*, UT 138 and *In the Matter of the Investigation into Compliance Tariffs filed by GTE Northwest Incorporated, Advice Nos. 589, 599, and 611*, UT 139 Order No. 00-316, Oregon Public Utility Commission (Entered 6-19-00) at http://www.puc.state.or.us/orders/2000ords/00-316.pdf

[7] See, e.g., Cause No. 40611-S1 (Phase II), Order, *In The Matter Of The Commission Investigation And Generic Proceeding On Ameritech Indiana's Rates For Interconnection, Service, Unbundled Elements, And Transport And Termination Under The Telecommunications Act Of 1996 And Related Indiana Statutes*, Indiana Utility Regulatory Commission (Feb. 17, 2003). Where the Indiana Commission notes:

> "Ameritech has argued . . . the Commission lacks the legal authority to order it to file a tariff or even make the rates that we establish herein effective . . .[and that] . . . we are required to implement such rates through individual interconnection agreements. {Footnote 81} We disagree. It is without dispute that the rates we adopt here all further the goal expressed in Indiana law to advance competition. Thus, Indiana

necessary direction to resolve these important jurisdictional disputes and conserve the federal courts and State commission resources.

OPINIONS BELOW

The opinion Wisconsin has asked this Court to review is reported at *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003). The decision of the United States District Court for the Western District of Wisconsin is *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Bie, et al.*, Case No. 01-C-0690-C (W. D. Wis. September 26, 2002) and is unreported. The Wisconsin decision that generated the appeal is in two parts in *Investigation Into Ameritech Wisconsin Operational Support Systems*, Docket No. 6720-

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and other states clearly can advance regulatory rules and laws that affirmatively promote valid state aims, including promulgating pro-competitive regulatory approaches such as the new rates' implementation mechanism. As a result, we find that Ameritech is ordered to file . . .tariffs incorporating the revised rates resulting from those revised studies....

{Footnote 3} The Commission notes that Ameritech argued the contrary in several interconnection arbitration proceedings . . . claim[ing] that arbitration of an interconnection agreement between two carriers is not the proper proceeding in which to establish or change the rates charged for UNEs that may affect all CLECs but that such charges may only be established in generic cost dockets such as the one at issue here. See, e.g., the Commission's August 7, 2002, Order in Cause No. 42144-INT-01: *In the Matter of Petition of BuyTel Communications, Inc. for Arbitration Pursuant to Section 252(B) to Resolve Open Issues for an Interconnection Agreement with Ameritech Indiana* (p.7). {Emphasis Added}.

TI-160 (Pub. Serv. Comm'n Wis. Sept. 25, 2001)(Final Decision (Phase I)) and (Pub. Serv. Comm'n Wis. Nov. 14, 2001)(Order Denying Rehearing and Corrections to Final Decision (Phase I)) (collectively, "*OSS Final Decision*"). Only the Final Decision (Phase I) is reported in electronic format, at 2001 WL 1671061. All of the foregoing decisions are set forth in the Appendix of the Petition for a Writ of Certiorari filed by WorldCom, Inc., in *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003), *petition for cert. filed,* (U.S. Oct. 17, 2003)(No. 03-603).[8]

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion and entered judgment on August 12, 2003. Wisconsin filed their Petition for a Writ of Certiorari within 90 days of the entry of judgment – invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the certain sections of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The principal sections at issue are codified at 47 U.S.C. §§ 251, 252, and 261. Also at issue is § 601(c)(1) of the Act, which is published as an uncodified note to 47 U.S.C. § 152.

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[8] Hereinafter all references to pages of the Appendix of WorldCom's Petition for a Writ of Certiorari (U.S. 03-603) will be denoted by "Ap-W.," followed by the relevant page number.

STATEMENT OF THE CASE

Mindful of the admonitions of U.S. Sup. Ct. Rule 37, and because NARUC only recently discovered that Wisconsin filed this petition, NARUC adopts by reference the Statement of the Case presented in Wisconsin's Petition for a Writ of Certiorari.

ARGUMENT SUMMARY

The Seventh Circuit's erroneous ruling effectively preempts any State administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. The history, purpose, and literal text of the 1996 Act simply do not support the such an interpretation. The Act was enacted against the background of the States' historic exclusive jurisdiction over intrastate telecommunications under § 152(b). By 1996, several States were already using that authority to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into such an area previously subject to State police power regulation, there is a particularly strong presumption that Congress did not mean to oust State law. *See Cipollone,* 505 U.S. at 518. Rather than displace State authority generally, the Act expressly preempts only State law entry barriers while enacting four separate savings clauses that authorize States to enact or enforce additional procompetitive requirements under State law (47 U.S.C. §§ 251(d)(2), 252(e)(3), 253(c), 261(c)), so long as they are not inconsistent with the minimum federal requirements: *i.e.* by "lowering" the federal floor. The Act is analogous to the

numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them. In contrast, Congress knows full well how to draft statutory language that serves as floor and a ceiling, and, when it does so, it expressly preclude States from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. Congress did not use any of these time-honored formulations in the 1996 Act.

ARGUMENT

The history, purpose, and literal text of the 1996 Act do not support the Seventh Circuit's decision.

Again mindful of the admonitions of U.S. Sup. Ct. Rule 37 concerning original material potentially helpful to the Court, NARUC fully endorses the arguments presented in Wisconsin's Petition for a Writ of Certiorari and offer only the following amplifications of those arguments.

The Seventh Circuit's erroneous ruling effectively preempts any State administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. Contrary to the letter and the intent of the Act, the Seventh Circuit's ruling effectively declares that "consistent with the Act" really means "identical to the Act." This basically eliminates a State commission's ability to advance any state pro-competition measure that is consistent with Act, but may go beyond the Act's minimums. The history, purpose, and literal text of the 1996 Act simply do not support the such an interpretation.

Any analysis of the preemptive scope of a federal statute must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Morales v. TWA*, 504 U.S. 374, 383 (1992), and with recognition that there is a "presumption *against* the preemption of State police power measures," *Cipollone v. Ligget Group*, 505 U.S. 504, 518 (1992) (emphasis added). Here, the history, terms, structure, and purposes of the Act make it explicit that § 251-2 and the FCC's implementing regulations are *minimum* requirements that establish a federal "floor" and that States can impose additional unbundling obligations under State law. The Act was enacted against the background of the States' historic exclusive jurisdiction over intrastate telecommunications under § 152(b). By 1996, several States were already using that authority to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into such an area previously subject to State police power regulation, there is a particularly strong presumption that Congress did not mean to oust State law. *See Cipollone,* 505 U.S. at 518.

Rather than displace State authority generally, the Act expressly preempts only State law entry barriers while enacting four separate savings clauses that authorize States to enact or enforce additional procompetitive requirements under State law (47 U.S.C. §§ 251(d)(2), 252(e)(3), 253(c), 261(c)), so long as they are not inconsistent with the minimum federal requirements: *i.e.* by "lowering" the federal

floor. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Further, the Act did not repeal § 152(b), and as this Court has held, States continue to have exclusive jurisdiction to regulate the rates that incumbents charge for local and other intrastate services – either directly or indirectly – and to adopt the policies that directly determine the extent to which incumbents (and others) will have incentives to invest and innovate. *Iowa Utilities Board v. FCC,* 525 U.S. 366, n.8 (1999).

Even more clearly, § 251(d)(3) itself precludes the Seventh Circuit's restrictive conclusions. Entitled "Preservation of State Access Regulations," it prohibits the FCC from prescribing or enforcing regulations that preclude the enforcement of State access and interconnection rules that are "consistent" with the requirements of § 251 and that do not "substantially prevent implementation" of the requirements of that section or the purposes of the Act's local competition provisions. It it is, of course, a limitation on federal power, *not a limitation on the States' role.* Further, this Court has held that State regulations are "consistent" with federal law so long as it is "possible to comply with the State law without triggering federal enforcement action," *Jones v. Rath Packing*, 430 U.S. 519, 540 (1977). By instead *permitting* States to impose additional access obligations so long as they are "consistent" with the requirements of § 251 (§ 251(d)(3)(B)), and do not "substantially prevent implementation" of the "requirements" of that section (§ 251(d)(3)(C)), Congress clearly outlawed only State measures that would preclude or substantially prevent the use of network elements to provide competing services, *not* provisions that would support the 1996 Act's goal of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . as an end in

itself" and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489. Thus, § 251(d)(3) bars only State measures that would require incumbents to violate the Act or would legally preclude or have the effect of precluding competitors from obtaining elements and using them to provide competing services.

Congress was fully aware at the time of the Act's passage that several States had already passed laws aimed at opening local markets to competition, *see* S. Rep. at 5 (noting that "[s]everal States . . . have taken steps to open the local networks of telephone companies"), and expressly sought to build on these State efforts. If Congress had intended to preempt those State laws, it could have done so expressly, as it did with State laws that restrict competition. *See* 47 U.S.C. § 253. Instead, Congress not only enacted the provisions preserving State law described above, it made clear that those provisions were intended to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. At 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215.

The import of the words "consistent" and "inconsistent" in the savings clauses such as § 251(d)(3) is well illustrated by *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). There, the Supreme Court held that a California law extending more generous leave benefits to pregnant workers than those provided by the federal Pregnancy Discrimination Act was not preempted by that statute. The applicable savings clause directed that no "provision of this Act [shall] be construed as invalidating any provision of State law unless such provision

is *inconsistent* with any of the purposes of this Act, or any provision thereof." *Id.* at 282 (quoting 42 U.S.C. § 2000h-4) (emphasis added). The Court held that the Act was "a floor beneath which pregnancy disability benefits may not drop – *not* a ceiling above which they may not rise." *Id.* at 285 (emphasis added). *See also Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762, 765-66 (7th Cir. 2002) (holding that a State law is "inconsistent" with a federal statute only if it is "more tolerant than the federal floor"); *see also E.B. Elliott Adver. Co. v. Metro. Dade County*, 425 F.2d 1141, 1150 (11th Cir. 1970) ("The word 'inconsistent,' as used in [a preemption provision] means contradictory in the sense of legislative provisions which cannot co-exist."); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985) ("A state or local law is 'inconsistent' with federal requirements under the [law] when it is not possible to comply with both, or where state requirements are an obstacle to an execution of federal law.").

The Act is therefore analogous to the numerous other federal statutes that place a floor under State regulation of the same subjects but not a ceiling above them. *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 216 (1997) ("We conclude that State law sets the standard of conduct as long as the State standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed."); *Old Bridge Chems., Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1292 (3d Cir. 1992) ("[A]lthough waste management may be an area of overriding national

importance, in legislating in the field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes."); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1454 (6th Cir.1991) ("CERCLA sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA."); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the floor of safe conduct; before transforming such legislation into a ceiling on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, courts should wait for a clear statement of congressional intent to work such an alteration." (internal citation omitted)); *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 295 n.8 (3d Cir. 2003) (Older Workers Benefit Protection Act "was enacted to establish a floor, not a ceiling." (internal quotation marks and alterations deleted)). These decisions recognize the general principle that "a state or locality's imposition of additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law." *Southern Blasting v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002).

In contrast, Congress knows full well how to draft statutory language that serves as floor and a ceiling, and, when it does so, it expressly preclude States from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. *See, e.g.*, Medical Device Amendments Act, 21 U.S.C. § 360k(a)(1) ("no State

may establish or continue in effect . . . any requirement which is different from, or in addition to, any requirement applicable under this chapter"); Federal Boat Safety Act of 1971, 46 U.S.C. § 4311 (preempting state "law or regulation . . . that is not identical to a regulation prescribed under section 4302 of this title"); Consumer Product Safety Act, 15 U.S.C. § 2075(a) ("no State or political subdivision of a State shall have any authority [to establish a safety requirement], unless such requirements are identical to the requirements of the Federal standard"); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note (b)(1)(A) ("no State . . . may establish or continue in effect a cautionary labeling requirement . . . unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b)."). Congress did not use any of these time-honored formulations in the 1996 Act.

CONCLUSION

Based on the forgoing, Petitioners respectfully request grant of the writ of certiorari. Respectfully Submitted

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